MEMBERS:

Marshall Criser, C
Bernard Stiger
Edward Foote, II
Preston Haskell
P. Scott Linder
Executive Director:
Carl Hawkins
Associate Director:
Donald Gifford

ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS

FINAL RECOMMENDATIONS

March 1, 1988

TABLE OF CONTENTS

ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS

FINAL RECOMMENDATIONS

Summary of Recommendations 1

Acknowledgments 7

Introduction 9

I. Recommendations for the Civil Justice System 16

A. Background 16

1. Purpose of Tort Law 16

2. Effects of the 1986 Tort Reform and Insurance Act 28

B. Specific Tort Law Revision 49

1. Joint and Several Liability and Comparative Fault 49

2. Retailer's Liability for Defective Products 55

3. Liability of Managing Co-Employees 56

4. Dog Owner's Liability Statute 57

5. Limitations on Non-Economic Damages; Negative Recommendations 58

6. Periodic Payment of Future Economic Losses 65

7. Indexing Statutory Thresholds and Caps . . 73

8. Punitive Damages 73

9. Collateral Source Offsets 74

10. Itemized Verdicts 77

11. Jury Instructions on Non-Economic Damages 80

12. Summary of Recommendations on "Sunset" Provisions of the 1986 Act 83

C. Alternative Compensation Systems 93

D. Process Reform 103

1. Limitations on Frivolous Claims and Defenses 103

2. Limitations on Contengent Fees 106

3. Reducing Delay and Litigation Costs 110

4. Alternative Dispute Resolution Processes 120

II. Recommendations for Insurance Regulation in Florida 140

A. Rate Regulation 140

1. General Structure 140

2. Hearings by Insurance Commissioner 145

3. Refund of Excessive "Use and File" Rates 147

4. Use of a Negative Underwriting Profit in Profit Calculations 148

B. Excess Profits Law for Commercial Lines 155

C. Property and Casualty Joint Underwriting Association 162

D. Countersignature Requirement 169

E. Prohibition of Rebates and Fee-Sharing 172

F. Regulation of Reinsurance 174

G. Information Reporting Requirements 177

III. Stabilization of Florida's Legal and Liability Insurance Environment 183

Appendix A 187

SUMMARY OF RECOMMENDATIONS

Tort Law Recommendations

1. The Task Force recommends that the Legislature amend Florida Statute 768.81 so as to adopt a modified comparative fault system providing that the plaintiff would not be able to recover when the plaintiff's degree of fault exceeds the cumulative percentage of fault allocated to all defendants.

2. The Task Force recommends that Florida Statute 768.81 regarding joint and several liability be amended to raise the statutory threshold for proportionate liability from $25,000 to $50,000. The Task Force further recommends repeal of the July 1, 1990 sunset provision applicable to this section as amended.

3. The Task Force recommends that the Legislature amend Florida Statute 440.11(1) regarding the liability of managing co-employees, as an exception to immunity granted under the Workers' Compensation Statute, to delete the phrase "gross negligence" and replace it with "knowing violation of safety statutes or regulations."

4. The Task Force recommends against any plan that would limit non-economic damages to a specified amount, except for the conditional limitation on non-economic damages previously recommended as a part of the arbitration proposal in medical liability claims.

5. The Task Force recommends that the Legislature expand the use of periodic payments of judgments for economic damages by amending Florida Statute 768.78 to:

(a) reduce the threshold for periodic payments from $250,000 to $50,000;

(b) permit the use of standard annuities to fund structured payments; and

(c) provide that plaintiff's attorney's contingent fee be based upon the market-determined present value of future periodic payments.

The Task Force further recommends repeal of the July 1, 1990 sunset provision applicable to this section, as amended.

6. The Task Force recommends that the Legislature enact a statute providing that all "dollar amount" thresholds and limitations applicable to tort remedies under Florida tort statutes, including both those enacted in response to these recommendations and those previously a part of Florida law, automatically be adjusted periodically to reflect changes in price levels.

7. The Task Force recommends that the Legislature repeal the "sunset provision" of the 1986 Act applicable to Florida Statute 768.73 governing punitive damages.

8. The Task Force recommends continuation of Florida Statute 768.76 governing collateral source payments. The Task Force does not recommend extension of the offset of collateral source payments to those payments for which the benefit provider has a subrogation right.

9. The Task Force recommends that legislation be enacted to modify the manner in which juries determine future economic damages. Such legislation should provide that:

(a) Juries be instructed to return itemized verdict forms with findings made of future economic losses specified for each type of economic loss for each future year for which the jury finds damages appropriate;

(b) Judges should reduce the findings to present value amount using either the current market rate for a standard annuity or a standardized discount rate determined by the State Court Administrator's Office and adjusted periodically; and

(c) All itemized verdict forms returned by juries should be compiled in a central record office for a period of not less than five years.

10. The Task Force recommends that the Florida Supreme Court submit to the Committee on Standard Jury Instructions the issue of whether more specific jury instructions on non-economic damages would be desirable.

11. The Task Force recommends that Florida Statute 767.04 be amended to eliminate the provocation or aggravation defense for any person under six years of age. Further, the Task Force recommends that the statute be amended to allow an action for negligence even if the statutorily required sign has been posted.

Civil Process Recommendations

12. The Task Force recommends that Florida Statute 57.105 be amended to adopt standards similar to those contained in Federal Rule of Civil Procedure 11, to govern when courts may sanction parties and their attorneys for filing frivolous claims and defenses.

13. The Task Force recommends that the existing limitations on contingent fees adopted by the Florida Supreme Court should be continued and that they should not be modified or replaced until they have had a chance to work. Two members of the Task Force, however, dissent on this issue and prefer more stringent limitations on contingent fees.

14. The Task Force recommends that the Florida Supreme Court consider adopting amendments to its discovery rules similar to those recently adopted to the Federal Rules of Civil Procedure, providing for discovery conferences, certification requirements, and more authority for trial courts to limit excessive discovery.

15. The Task Force recommends that the Florida Supreme Court consider adopting an amendment to Florida Rule 1.510(e), so as to clarify an ambiguity as to when a summary judgment is appropriate.

16. The Task Force recommends that the Legislature adopt the "Mandated Demand for Judgment Plan" described fully in this report, which requires the plaintiff to make a demand for judgment in every case and imposes interest penalties when the plaintiff fails to make a realistic demand or when the defendant fails to accept a realistic demand.

17. The Task Force endorses prior legislative efforts to facilitate the use of arbitration and mediation in the civil justice system. The Task Force recommends that the Legislature fund appropriate pilot projects and training programs for arbitrators and mediators. The Task Force recommends continuing research on the expanded use of summary jury trial procedures.

Insurance Regulation Recommendations

18. The Task Force recommends against any changes in the insurance rate regulation provisions enacted by the Legislature in 1986.

19. The Task Force recommends that the Excess Profits Law adopted in 1986 be amended to extend the four-year period used to calculate excess profits to a six year-period, which more closely approximates the length of an insurance underwriting cycle.

20. The Task Force recommends that Florida Statute 627.351(5), providing for the Florida Property and Casualty Joint Underwriting Association, be amended to provide that the joint underwriting association be established initially on "standby" status and requiring a finding of specific statutorily defined facts before the JUA would become operational.

21. The Task Force recommends that Legislation be enacted requiring insurance carriers doing business in the state of Florida to regularly provide specified information on loss payments, legal expenses, profitability, market prices and volume of coverage being provided to Florida consumers.

22. The Task Force recommends that the Legislature pass a resolution supporting a five year period during which it would not engage in further substantial restructuring of the state's tort and insurance law unless there was a compelling public necessity to do so. The Task Force believes that such forbearance would contribute to stability in the legal and liability insurance systems.

ACKNOWLEDGMENTS

These Final Recommendations of the Academic Task Force for Review of the Insurance and Tort Systems are the culmination of the Task Force's extensive research efforts during the past eighteen months. The recommendations take into account information and opinions offered by a diverse group of individuals and organizations interested in Florida's legal and liability insurance systems and the analysis of the Task Force's research staff.

Executive Director Carl S. Hawkins, Guy Anderson Professor of Law at the J. Reuben Clark Law School of Brigham Young University, and Associate Director Donald G. Gifford, Professor of Law at the University of Florida, directed the Task Force's research and investigation in Florida's insurance and tort systems and the preparation of the alternative solutions considered by members of the Task Force.

The other members of the research team involved in these efforts included Dr. David J. Nye, Associate Professor of Finance and Insurance, University of Florida; Joseph W. Little, Professor of Law, University of Florida; Dr. Roger D. Blair, Professor of Economics, University of Florida; and Mr. Bernard L. Webb, Professor of Actuarial Science, Risk Management and Insurance, Georgia State University. The Academic Task Force also expresses its appreciation to computer programmer Michael Kelly and to research assistants David Brannon and Peggy Lyon, both law students at the University of Florida. Administrative Secretary

Noreen Fenner prepared this manuscript and continued to perform flawlessly a variety of administrative and public relations services.

The University of Florida, and its College of Law, donated the physical facilities used by the Academic Task Force staff and considerable administrative assistance. The Task Force thanks Deans Frank T. Read and Jeffrey Lewis for the office space, computer terminals, supplemental secretarial help and other forms of cooperation which were essential for the completion of the Task Force's responsibilities. Florida State University and the University of Miami also assisted the Task Force in a number of ways.

The Academic Task Force received the cooperation of a wide variety of governmental agencies, organizations, corporations and individuals in its research and fact-finding efforts. Many of these organizations and individuals were specifically acknowledged in the Final Fact-Finding Report on Insurance and Tort Systems. In addition, many individuals and organizations provided constructive oral and written comments on these recommendations. The Task Force thanks the scores of individuals who testified regarding these recommendations at public hearings in Miami, Orlando and Gainesville.

Despite the assistance of these many groups and individuals, these recommendations remain solely the responsibility of the Academic Task Force.

INTRODUCTION

This report contains the Final Recommendations to the Florida Legislature by the Academic Task Force for the Review of the Insurance and Tort Systems. The Task Force was established by the Legislature in 1986 and was charged with the responsibilities of studying Florida's problems involving affordability and availability of liability insurance.[1] The Legislature directed the Task Force to review the impact of the reforms it had enacted in the Tort Reform and Insurance Act of 1986 and to make further recommendations regarding the state's tort and insurance systems by March 1, 1988.

The five members of the Task Force included the presidents of three major Florida universities and two businessmen with distinguished public service backgrounds selected by the three university presidents: Chairman Marshall Criser (President, University of Florida); Edward T. Foote, II (President, University of Miami); Preston H. Haskell (President, the Haskell Company, Architects/Engineers/Contractors); P. Scott Linder (Chairman of Linder Industrial Machinery Company); and Bernard F. Sliger (President, Florida State University).

To supervise its research into Florida's insurance and tort system, the Task Force retained Executive Director Carl S. Hawkins, Guy Anderson Professor of Law at the J. Reuben Clark Law School of Brigham Young University and Associate Director Donald G. Gifford, Professor of Law at the University of Florida. Professor Hawkins hired a research staff with experts in the fields of law, insurance, actuarial science, economics and medicine.

The Task Force undertook a massive research project to determine the scope and the true causes of problems in Florida's insurance and tort systems. The results of this analysis are contained in the report accompanying these recommendations, the Task Force's Final Fact-Finding Report on Insurance and Tort Systems. That volume also describes the Task Force research process.

At the request of Governor Martinez and legislative leaders, the Task Force expedited completion of its research efforts relating to Florida's medical malpractice problems. On August 14, 1987 the Task Force released its Preliminary Fact-Finding Report on Medical Malpractice which analyzed the extent and causes of the problems in the state of Florida regarding the affordability and availability of medical liability insurance. On November 6, 1987 the Task Force adopted its Medical Malpractice Recommendations. These recommendations formed the core of the medical malpractice reform legislation passed by the Florida Legislature and signed by the Governor during February 1988. The Task Force medical malpractice recommendations will not be repeated in this report.

Simultaneously with its research into the scope and causes of Florida's liability insurance problems, the research staff of the Task Force investigated a wide variety of alternative reform proposals regarding the insurance and tort systems. Many of these reform proposals were ones that had been considered or adopted in other jurisdictions; some were proposed by one of the interest groups involved in Florida's insurance and tort systems;

others had been advocated in law review articles and other academic literature; still others were proposals which originated from the members of the Task Force or of the research staff. The Task Force did not believe it was compelled to recommend "reform" proposals. Indeed, the alternative of relying upon the "self-correcting" capabilities of the common law tort system was considered carefully, as were various proposals to reverse the tort reforms of the 1986 legislation and to return to the pre-existing common law doctrines.

The Task Force members reviewed a variety of alternative proposals for addressing problem areas. These alternatives were described in two staff reports considered by the Task Force: Discussion Draft, Tort Reform Alternatives (December 16, 1987) and Discussion Draft, Insurance Regulation in Florida: Fact-Finding Report and Proposed Recommendations (December 30, 1987). The substance of these recommendations was debated by the members of the Task Force during six meetings, and public testimony regarding these recommendations was heard during meetings in Miami, Orlando and Gainesville. Prior to consideration of these specific recommendations, the Task Force had conducted eleven other public meetings in all areas of the state.

These recommendations do not involve a substantial restructuring of the tort system. A comparison of the analysis in the Preliminary Fact-Finding Report on Medical Malpractice with the Final Fact-Finding Report on Insurance and Tort Systems shows that problems in most areas of the state's liability insurance and tort systems are substantially less severe than in the medical malpractice area. In most instances, the liability

insurance premium increases have been considerably less than those for medical malpractice liability coverage. The average amount of a claims payment in areas other than medical malpractice is between $7,000 and $15,000, considerably less than the $121,000 average claims payment in medical malpractice cases.

Liability insurance problems in other areas are genuine and substantial, only less severe than in the medical malpractice area. The Task Force found that insurance premiums in Florida since 1981 had increased at a rate substantially in excess of inflation, and that in some types of coverage the increases had been dramatically greater than in others. Similarly, the increase in loss payments, a factor substantially influenced by the legal system, was the primary cause of these premium increases. Nonetheless, the Task Force concluded that major structural reforms of the tort system, of the kind earlier recommended for the medical malpractice system, were not warranted.

The Task Force does recommend, in a few areas, modifications of the tort system that go beyond the 1986 legislation. The most important of these reforms include changing the manner in which juries determine economic damages so that such damages more accurately reflect actual wage loss and medical expenses,[2] expanding the use of periodic payments of economic losses,[3] making it easier for courts to sanction parties and attorneys who file frivolous claims and defenses,[4] and providing strong financial incentives for parties to reduce delay and to evaluate the merits of their cases earlier in the litigation process.[5]

In two areas, the Task Force recommends that the Legislature re-evaluate the contents of the 1986 legislation. First, while generally approving the Legislature's approach to the issue of joint and several liability, the Task Force recommends that the "threshold" amount which separates traditional application of joint and several liability principles from the procedures adopted in the 1986 legislation be raised from $25,000 to $50,000.[6] Second, the Task Force concludes that, outside of the specific context of medical malpractice, limitations on non-economic damages are not warranted.[7] Of course, the Florida Supreme Court has declared the $450,000 limitation on non-economic damages passed by the Legislature in 1986 to be unconstitutional.[8]

The Task Force evaluated the substantial insurance regulatory reforms contained in the 1986 legislation and compared them with other possible regulatory approaches. The most important and controversial components of Florida's existing regulatory structure are the rate regulation provisions, the excess profits law and the statutes providing for the commercial joint underwriting association. The Task Force concludes that the 1986 rate regulation provisions were an appropriate response to the state's liability insurance problems and should be allowed to work. Regarding the excess profits law, the Task Force found that the four year period used to determine excess profits is too short, because of the dramatic changes in insurance company profits from one year to the next. The Task Force, therefore, recommends that the time period for determining profits be extended to six years, so that it corresponds more closely with

the typical length of the insurance industry underwriting cycle during which profits vary dramatically from one year to the next.

The Task Force endorses the idea of a commercial lines joint underwriting association, but recommends that the law be amended to provide that the joint underwriting association be established initially as a "standby-JUA." The "standby-JUA" would allow the Department of Insurance to establish the structure and regulations necessary to operate the JUA; the JUA would not become operational, however, until the Department of Insurance had proved specific statutorily defined facts showing the need for a joint underwriting association. The Task Force concludes that this process would serve the interests of both Florida insurance consumers and Florida insurers better than the current statutory provisions.

FOOTNOTES
(Introduction)

[1]1986 Fla. Laws, Tort Reform and Insurance Act of 1986, Pub. L. No. 86-160 965-764.

[2]See infra Section I.B., notes 81-83 and accompanying text.

[3]See infra Section I.B., notes 67-70 and accompanying text.

[4]See infra Section I.D., notes 1-8 and accompanying text.

[5]See infra Section I.D., notes 18-51 and accompanying text.

[6]See infra Section I.B., notes 1-26 and accompanying text.

[7]See infra Section I.B., notes 48-66 and accompanying text.

[8]See Smith v. Dept. of Insurance, 507 So. 2d 1080 (Fla. 1987).

I. RECOMMENDATIONS FOR THE CIVIL JUSTICE SYSTEM

A. BACKGROUND

1. Purpose of Tort Law

a. Introduction

Any attempt to assess performance of the tort system or to evaluate proposed reforms should be guided by some understanding of the purpose of tort law. Many writers, with varied emphasis, have identified objectives of tort law in terms of compensation, deterrence, conflict resolution and punishment.[1] The lack of consensus on a single definition of purpose is understandable, because tort law has grown incrementally and pragmatically, responding to varied needs. This report will urge that the purpose of tort law is best understood as a conflict resolution system to define the civil limits of harmful behavior.[2] One member of the Research Staff takes a somewhat different view, for reasons stated in the footnote.[3] The proffered definition does not foreclose consideration of specific reforms to make liability insurance more affordable and more available, as an interdependent part of the tort system. However, the reform effort should be guided by objectives that are consistent with the purpose of tort law and should not be used to achieve other objectives under the guise of tort reform.

b. Criticism of the Compensation Objective

Some form of reparation to victims or their families has always been associated with tort law and its antecedents.[4] Some contemporary writers assume that the principal objective of tort law is to provide compensation for accident victims.[5] Judged by this standard, the tort system performs poorly. Empirical

studies have shown that the tort system compensates only a small percentage of all accident victims.[6] Victims who do receive compensation tend to be undercompensated for major injuries and overcompensated for minor injuries.[7]

If tort law is to be judged as a compensation system, then its failure to compensate most accident victims must be justified.[8] The justification must be based upon a principle of limited liability that compensates only those who were injured by another's fault or legal wrong.[9] Even if one accepts this principle, administration of the standard for limited liability remains difficult.[10]

Negligence, the legal standard applied to most accidental injuries, is complex and elusive.[11] Even when its conceptual vagaries are reduced to manageable terms for application in a particular case, there remains the imponderable question of how jurors will respond to the many shades of meaning it has for them.[12] This has led some critics to charge that the system lacks the rational predictability[13] needed for maintenance of a reliable and affordable compensation system.[14]

Critics also attack the unpredictability of the legal standards for measuring the amount of compensation paid to accident victims.[15] This criticism centers upon the attempt, in tort law, to make reparation in dollars for such incommensurable losses as pain and suffering, humiliation, emotional distress, and mental anguish.[16] Various studies have estimated that these elements may account for half or more of the amounts paid in settlements and judgments for personal injury.[17] Compensation advocates believe that money paid for these intangible losses

would be better spent if allocated among the measurable economic losses suffered by those accident victims who receive no compensation under the tort system.[18]

Critics also urge that the tort system lacks the economic efficiency necessary to provide optimum compensation for accident victims.[19] The administration of a system that depends upon fault-based principles of limited liability is inherently inefficient.[20] Studies reveal that the tort system expends one dollar or more in transaction costs for every dollar it ultimately pays to accident victims, and payment is frequently delayed beyond the time of greatest need.[21]

These criticisms have persuaded some to advocate replacement of the tort system, at least in part, by some combination of no-fault insurance payments or social welfare benefits to provide limited compensation for most accident victims.[22] However, their criticism of the tort system may only prove that the system is being judged by the wrong standard. The tort system's poor performance as an accident compensation system may suggest that compensation was never meant to be its principal purpose.[23]

c. Criticism of the Deterrence Objective

A second posited objective of tort law is the deterrence of unsafe or imprudent behavior.[24] While this deterrence logic could also be applied to the goal of reducing wrongful conduct, recent writing has emphasized goals of economic efficiency,[25] to avoid injuries that are not cost-justified.[26] The idea is that "tort law should encourage individuals and firms to invest in safety up to, but not beyond, the point at which incremental safety costs equal incremental injury costs."[27]

Evaluating the performance of tort law in these terms suggests difficulties at least as severe as those encountered in connection with the compensation objective. Some criticism flows from the potential disparity between theoretical and practical deterrence.[28] Other criticism reflects the difficulty of allocating costs to the activities that caused them.[29]

Many critics doubt that tort law has much deterrent effect in real life.[30] Economic theories of deterrence may be based upon unrealistic assumptions about human behavior, supposing that conduct is largely based upon rational and fully informed cost-benefit calculations.[31] Such assumptions may be especially questionable in the tort context of accidental injuries, involving unintended consequences from unplanned events.[32]

Applied tort law does a poor job of allocating actual costs of injuries to the activities that produced them, and thus fails to fulfill one of the necessary conditions for effecting economic deterrence.[33] Most victims never claim compensation,[34] and many of those who do receive compensation settle for more or less than actual costs.[35] In addition, the few claims that reach formal adjudication complicate the cost allocation problem by permitting juries to make substantial awards for incommensurate intangible losses such as pain and suffering.[36]

d. Criticism of the Punishment Objective

Nobody asserts that punishment is the exclusive objective of the tort system.[37] Nevertheless, a pervasive punitive objective seems to be implied in some arguments that tort liability should be limited to cases involving moral fault.[38] But tort law

performs poorly as an instrument of retribution.[39] Much tort liability is borne by entities once or twice removed from the actual wrongdoer -- first imposed vicariously upon employers and corporate institutions, and then paid by liability insurance companies.[40]

Even when liability is imposed directly upon the individual who caused the injury, the basic goal is reparative, to replace what the victim lost, rather than retributive. The remedy of forced reparation may be imposed for conduct that was not morally blameworthy.[41] Negligence law employs an objective standard that may impose liability upon persons who were not subjectively culpable.[42] While strict liability rules may imply some kind of social or economic "fault" for causing injury in particular circumstances, moral fault is disavowed as a requirement for liability.[43] In addition, tort damages as measured by reference to the victim's loss will often be out of proportion to the level of moral fault involved in defendant's conduct.[44]

e. Incompatible Objectives

Difficulties with compensation, deterrence, and punishment as objectives cannot be resolved simply by suggesting that tort law was meant to perform a combination of these functions.[45] Compensation, deterrence, and punishment policies, while occasionally complementary, must ultimately lead the law in different directions.[46]

> That dissonance should result from such disparate aims is hardly surprising. After all, the compensation function suggests the need for liability rules that impose injury costs on those parties most capable of bearing and redistributing such costs. The deterrence function, on the other hand, suggests that those parties best able to avoid accidents or to evaluate the cost-

> justified amount of safety should bear losses. Finally, the punishment function demands that losses be assigned to morally blameworthy parties. There is no reason to expect compatibility among these various directives. Quite often the party most capable of bearing and spreading losses is not in the best position to avoid injuries or to evaluate safety costs. Moreover, if the cost-bearing party can simply pass the loss onto a diffuse group of customers or fellow liability policy-holders, the sanction's deterrent effect will obviously diminish. Finally, the best loss spreaders or accident avoiders may be blameless.[47]

Therefore, some critics of the tort system conclude that these incompatible objectives would be more effectively fulfilled if assigned to separate regimes like social welfare programs (for compensation), regulatory agencies (for deterrence), and the criminal justice system (for punishment).[48]

f. Tort Law as a Conflict Resolution System to Define Civil Limits on Harmful Behavior

The purpose of tort law is better explained as a system to define standards of conduct and resolve disputes over their application.[49] This statement implies two interlocking objectives.[50] The first is to provide principles or standards that define the civil limits on harmful behavior.[51] The second is to provide a highly particularized process to resolve disputes over application of those standards and to provide a civil remedy upon their violation.[52]

This definition of the purpose of tort law lacks the apparent simplicity of singular objectives like compensation, deterrence, or punishment.[53] However, it does illuminate some important values that may be overlooked by emphasizing those other objectives.[54]

Between those standards that are enforced through administrative regulation or penal sanctions and those that are

enforced by individual conscience and social pressure lies a range of choices that a free society leaves largely unregulated.[55] However, when the exercise of unregulated choice results in personal injury giving rise to a dispute, a resolution process is essential.[56] Consequently, legal standards are provided to reconcile the competing demands of liberty and accountability in a principled way,[57] and a process is implemented to resolve disputes over the application of those standards.[58]

This is the purpose of the tort system.[59] Its legal standards are expressed in general and flexible formulas that must be applied to highly individualized circumstances in order to resolve a particular dispute.[60] This requires an elaborate and sometimes expensive process.[61] But when its work is done, the process not only resolves the individual dispute, but it also defines and reinforces standards of conduct expressing shared expectations that are needed for social cohesion.[62]

Compensation, deterrence, and punishment are relevant, but they are better understood as means to reinforce the standards of conduct and implement the conflict resolution process.[63] They are not the only objectives by which performance of the tort system should be judged.[64]

Viewed from this perspective, the fact that the tort system does not compensate most accident victims is not a fatal flaw.[65] The failure of most victims to claim compensation may mean that for many injuries there is no dispute over legal accountability that is serious enough to require institutional resolution.[66]

When claims are made and denied, the dispute resolution objective is accomplished, and the legal standard for acceptable conduct is confirmed or refined.[67] This occurs, even though the outcome may not satisfy other needs or desires to provide for the victim's economic welfare.

This perspective also justifies a system that tries to award compensation for non-economic losses.[68] Viewed as a conflict resolution system, tort law needs to take into account such individualistic and subjective matters as pain and suffering, in order to remedy the victim's sense of compensable loss.[69] Viewed as a process for defining standards of conduct, the monetary award for such real but incommensurable losses restores confidence in the legal standard that was violated by acknowledging the fact and magnitude of the victim's injury and expressing the strength of society's commitment to the standard.[70]

While tort law may not directly deter uneconomic behavior, its conflict resolution process serves to reinforce social expectations of reasonably prudent conduct.[71] This reinforcement mechanism should have some influence on those who decide what level of safety is expected in their economic activities.[72] This may provide a valuable kind of indirect deterrence to imprudent conduct, even if that is not the ultimate objective of tort law.

Tort liability may not correlate well with punishment for moral fault,[73] but its criteria for liability are not irrational when considered as a system for defining the civil limits of harmful conduct.[74] The system need not carry the burden of imposing punishment for moral wrongs that cause no injury or

create no legal dispute.[75] Civil limits on harmful behavior may be defined rationally in terms other than subjective fault, for example: confining dangerous substances to one's own premises, selling products that are reasonably safe according to ordinary consumer expectations, or exercising reasonable care to avoid foreseeable injuries.[76] Reinforcing and maintaining such standards through a conflict resolution process is a valuable and legitimate function, even if it does not correspond precisely with punishment for moral wrongdoing.

g. Defense of the Proposed Definition

It may be argued that stating the purpose of tort law as a conflict resolution system to set civil limits on harmful behavior merely describes the system as it is, rather than prescribing what the system ought to be. But an argument that the system ought to serve a different function than what it now performs implies a political choice, not merely a disagreement over definitions. Defining tort law as a system for prescribing standards of conduct and resolving disputes over their application provides the most accurate description of what the system does.[77] In addition, it also recognizes the values implicitly served by that system -- a stable and peaceful order, based upon civil reinforcement of legal standards in a way that strives to reconcile the competing demands of liberty and accountability with minimal regulation or intrusion by the government.[78] These values should not be inadvertently sacrificed in pursuit of other objectives.[79]

It has been argued that the need for such intricate standards and such costly dispute resolution processes could be avoided, if most accident victims were assured prompt payment of basic economic losses.[80] Any system for compensating accident victims would still require some standards to determine eligibility and some process to resolve disputes over their application.[81] As suggested by the workers' compensation analogy, simpler standards and fewer or less expensive disputes might be possible, if compensation is the only objective.[82] However, the need to prescribe limits for dangerous behavior (safety standards) would not vanish. If that need was no longer addressed by the tort system, it would presumably have to be met through administrative regulation or criminal sanctions.[83] The workers' safety need, for example, has been pursued through OSHA, an expensive regulatory process that has not used simpler standards than tort law to achieve its objectives.[84]

Experience with automobile no-fault laws leads to a similar conclusion.[85] These laws, recently adopted by seventeen states, are essentially "small claims" statutes.[86] They provide no-fault compensation and tort immunity only up to defined thresholds, above which noneconomic losses such as pain and suffering, disability, disfigurement, and mental anguish take on increasing importance.[87] No-fault laws explicitly recognize the need for tort liability standards and more elaborate conflict resolution processes to provide individualized assessment of liability and damage for injuries above the statutory thresholds. For accidents producing losses below the defined thresholds, the violated standards of conduct are still reinforced by pervasive

civil and criminal penalties for traffic safety violations and by an extensive regulatory apparatus that was already established.

Justifying tort law as a system to prescribe standards of conduct and resolve disputes over their application does not foreclose consideration of specific reform proposals. Particular refinements in the basis of liability or the measure of damages will not necessarily impair the function of defining standards of conduct. In fact, the conflict resolution function might even be enhanced by procedural changes that would reduce litigation costs or provide better incentives for prompt resolution of disputes. These possibilities are considered in other sections of this report.

h. Role of Liability Insurance in the Tort System

Tort law and its antecedents functioned as a system to define standards of conduct and resolve disputes over their application long before liability insurance emerged.[88] Liability insurance was developed at the beginning of the twentieth century, when increasing accidental injuries resulting from expanded industrial and commercial activities created the demand for a means to protect enterprise from the costs of tort liability by spreading the costs more broadly among those engaged in similar enterprises.[89]

The liability insurance industry now fulfills three vital functions in relation to the tort system. First, liability insurance enables enterprises and individuals engaged in injury-producing activities to protect their capital by spreading the risk of tort liability among larger groups involved in similar

activities. Second, liability insurance provides for the defense of most tort claims that are actually litigated and for payment of most of the resulting judgments. Third, the liability insurance industry, operating in the shadow of the formal tort system, provides an apparatus for settling most disputes arising out of potential tort claims and for paying most claims in which awards are made.

It is doubtful that our economy could have achieved its present level of productivity without the first two functions. The Florida legislature recognized this in the Tort Reform and Insurance Act of 1986.[90] The legislature concluded that circumstances "threatening to make [liability] insurance coverage less available and less affordable . . . will seriously effect many sectors of Florida's economy."[91]

It is likely that, without the third function, tort law as a conflict resolution system would have broken down long ago, under the burden of increasing numbers of more complex claims. If the tort system is viewed as a process for prescribing standards of conduct and resolving disputes over their application, it must still be recognized that liability insurance provides an important assist to the system. The Florida legislature recognized this by finding that "tort law and the liability insurance system are interdependent and interrelated,"[92] that without available and affordable liability insurance "many injured persons will . . . be unable to recover damages for either their economic losses or their noneconomic losses,"[93] and that legislative action was "necessary ... to protect the people's rights to affordable insurance coverage."[94] Therefore,

it is still necessary to consider whether particular reforms may be appropriate or necessary, in order to retain affordable liability insurance as an interdependent part of the tort system.

2. Effects Of The 1986 Tort Reform and Insurance Act

The 1986 Act directed the Task Force, among other things, to "examine and evaluate the effects of the provisions implemented by [the Act], including the effect of all tort and insurance provisions on the cost of insurance, self insurance, and the tort and liability system [and] on society as a whole . . ."[95] Much of the Task Force's evaluation is subsumed within the discussion of various alternative reform proposals in the following sections of this report. This section reports more generally on the studies that were undertaken to complete the task of evaluation with respect to various elements[96] of the tort reform measure in the 1986 Act. Those specific tort reform measures are:

1. Collateral source offsets.[97]
2. Several (proportionate) liability.[98]
3. $450,000 cap on noneconomic[99] damages.
4. Punitive damage limitations.[100]
5. Offer and demand for judgment statute.[101]
6. Periodic payment of awards of future economic damages.[102]
7. Shifting of attorney fees in cases of meritless claims and defenses.[103]
8. Strengthened remittitur and additur provisions.[104]
9. Itemized verdict provision.[105]

The Task Force has no data by which a valid quantitative evaluation of the effects of these measures on the cost of

liability insurance and self-insurance may be made. In reply to a Task Force survey one large insurer noted that many lawyers were apparently filing actions earlier than usual as to pre-statute injuries before the statute became effective to avoid any entanglement with its operations and opined that many post-injury actions might be delayed in order to see which, if any, of the 1986 provisions are eliminated or modified. In any event, a statistical picture of actual performance may not yet be painted.

In an attempt to augment its own judgment with that of other informed people, the Task Force surveyed samples of liability insurers[106] and seasoned trial lawyers[107] to obtain their judgments and opinions about the potential effects of various of the 1986 provisions.

Coming at the beginning of the study, the insurance survey inquired only as to the elements of the 1986 Act that were deemed to be the most directly connected to costs: the collateral source offset; the several liability scheme; and the $450,000 cap.[108] The most frequent response to all three measures was that they would have no important effect as to either affordability or availability, in the opinion of the insurance companies. Nevertheless, the second most frequent response was that the measures lowered prices (less than 10%) and increased availability (but not strongly). Table I tabulates the responses.

A few insurers submitted written explanations. One noted that it deemed the effect of changes in law to be entirely speculative and accordingly made its pricing decisions solely on the basis of performance. Another reported on a full blown

Table I
Insurance Survey
Most Frequent Responses
As to Effects of 1986 Measures
(23 responses)

	Collateral Source Offset	Several Liability	$450,000 CAP
No Effect on Prices	45%	43%	64%
Lowered Prices (less than 10%)	41%	39%	27%
No effect on Availability	60%	48%	77%
Increased Availability (not strongly)	23%	35%	14%

attempt it had made to estimate the quantitative effects of the measures based upon an internal closed claim study. This insurer assigned the cap the greatest effect on cost, but found the effect to be limited to umbrella coverages. Picking up on that theme, another insurer observed that because its coverages were usually less than $500,000, the cap was virtually ineffective. This particular insurer saw no great price effect from the 1986 Act but deemed the thrust of it to be a "step in the right direction." If the aggregated statistics have any message it is that while the 1986 Act in toto will not reduce prices substantially or ease availability greatly, it was nevertheless "a step in the right direction."

The sample population of experienced trial lawyers was asked to express a judgment as to the effect of the various measures in the 1986 Act on the cost of liability insurance and self-insurance and to express an opinion as to whether each measure was justified either on a cost or other basis.[109]

As to cost reductions, a majority or more of the defendants' lawyers expressed the view that four elements of the 1986 Act would reduce costs enough to make an economic difference. These are:

Collateral source offset.

Several (proportionate) liability scheme.

A valid $450,000 cap.

Structured awards.

Moreover, a majority of the defendants' lawyers also believed that these four measures were justified by cost reductions and that a fifth (structured awards) was justified on some basis.

By contrast, not one of the measures in the 1986 Act garnered the support of a majority of the plaintiffs' lawyers for the proposition that it would reduce insurance costs enough to make an economic difference.

As to whether the various measures could be justified on some basis, a majority of the defendants' lawyers support each and every element of the 1986 Act. By contrast, the only measure supported on any basis by a majority of the plaintiffs' lawyers were the offer and demand for judgment provisions. Large majorities of the plaintiffs' lawyers, as indicated by the following percentages, deemed the other measures to be unjustified on any grounds: collateral source offset (84%); several (proportionate) liability (92%); a valid $450,000 cap (98%); punitive damage limitation (95%); structured awards (87%); attorney fee shifting statute (63%); and, strengthened remittitur and additur provisions (67%).

The lawyers were also asked:

1. What additional effects would accrue from prohibiting subrogation clauses in first party insurance contracts, thereby extending the reach of the collateral source offset statute?
2. What difference does it make to have judges as opposed to juries make the offsets?
3. How long must reform measures be in place before whatever influence they are capable of manifests itself?

As to the additional effects of prohibiting subrogation clauses, slightly less than a majority (49%) of the defendants' lawyers thought it would reduce costs enough to make an economic difference, but more than a majority (54%) of the plaintiffs' lawyers thought it would make no difference.

As to who makes the offset, more defendants' lawyers (40%) thought that having juries, rather than judges (37%), make the offset would reduce costs more. By contrast more than a majority (64%) of the plaintiffs' lawyers thought it makes no difference, but of those that thought it does, about four (24%) to one (6%) thought that having judges do it would reduce costs more.

These results convey marked differences in judgment and opinion between defendants' and plaintiffs' lawyers both as to the effect on costs and the justice of the elements of the 1986 Act. Although some readers might be inclined to dismiss the responses as nothing but an impulsive reflection of pre-existing attitudes, one may also infer that the two categories of lawyers look at the various provisions from different perspectives and with different motivations. The meaning of this point was captured in an insurance company's comment that the cap on economic damages would have limited effect because juries would reclassify elements of damages to reach the overall result they wish to achieve. This implies that juries will understand the consequences of their decisions, which is, of course, exactly what plaintiffs' lawyers will strive to make possible. With the one exception noted, the plaintiffs' lawyers overwhelmingly rejected the justice of the various measures. One may assume that if a way can be found to defeat the operation of unjust

measures, plaintiffs' lawyers will find it. By contrast, defendants' lawyers believed the measures to be just and will try to make them work.

Whether the measures in the 1986 Act ultimately reduce costs will depend upon how just judges and juries ultimately deem them to be. If the defendants' lawyers are correct, some cost savings will ensue; if the plaintiffs' lawyers are correct, little cost savings will be seen. The point of this is that the difference in reply patterns may well reflect thoughtful, and not merely reactive, reflections of attitude. Nevertheless, an evaluation of all the opinions available to the Task Force, including those of members of the Research Staff, suggests that the economic effects of these particular measures will in the long run have a modest direct effect on reducing costs. Their greatest importance may be in imposing increased discipline in the application of the law, thereby preventing future excesses.

The final question asked of the lawyers was how long the reform measures need to be in place before whatever effects they are capable of manifest themselves. The array of answers was:

	Defendants' Lawyers	Plaintiffs' Lawyers
Five years or more	20%	13%
More than 3, but less than 5 years	54%	27%
More than 1 to 3 years	21%	20%
One year or less	0	1%
No opinion	0	2%
No change	5%	38%

This survey was distributed in October 1987, slightly more than a year after the effective date of the 1986 Act. Accordingly, it is plain that the lawyers virtually unanimously reject the proposition that effects would be manifested yet. It is also apparent that most believe that a maturation period of three to five years is needed to obtain an experiential evaluation.

FOOTNOTES
(Section I.A.)

[1]W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 5-6 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]. See Seavey, Review of Winfield: Province of the Law of Tort, 45 HARV. L. REV. 209 (1931); Wright, Introduction to the Law of Torts, 8 CAMBRIDGE L. J. 238 (1944). A comprehensive study for the American Bar Association lists as many as nineteen identifiable purposes or objectives, most of which may be subsumed under one of the major headings discussed below. SPECIAL COMMISSION ON THE TORT LIABILITY SYSTEM, AMERICAN BAR ASS'N, TOWARDS A JURISDPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter cited as ABA REPORT]; See generally F. HARPER, F. JAMES, O. GRAY, THE LAW OF TORTS 97-101, Vol. 3, (2nd ed. 1986) [hereinafter cited as HARPER & JAMES]; White, The Intellectual Origins of Torts in America, 86 YALE L. J. 671 (1977).

[2]See infra text accompanying notes 49-76.

[3]Professor Gifford prefers somewhat different characterizations of both the goals of the tort system as it exists today and the purposes the tort system should strive for in the future. He believes that describing the purpose of tort law as "a conflict resolution system to define the civil limits of harmful behavior" is an adequate definition of what the tort system does in operation, but that it does not shed any light on what goals courts should strive for in defining the civil limits of harmful behavior.

The report also criticizes those scholars and judges who identify either compensation or deterrence as the predominant goal of the tort system. The report implies an inaccurate description, according to Professor Gifford, of what most judges and tort scholars consider the goals of tort law to be. Generally the tort system is viewed as responding to multiple goals of compensation, deterrence, assessment of moral blameworthiness and conflict resolution. This predominant view of the tort system recognizes that the failure to achieve fully one goal, such as compensation, is an inevitable product of attempts to achieve multiple goals. Scholars who focus on any single goal of the tort system, such as Professor O'Connell's emphasis on compensation, do not represent the traditional consensus view of the goals of the tort system, but rather recent critiques which have had significant---but not pervasive---influence on the tort system and on tort theory. The report does not adequately describe nor critique the most common view of tort goals---an attempt to balance the often conflicting goals of deterrence, compensation, conflict resolution and moral blameworthiness.

In the view of Professor Gifford, the process of establishing standards for defining the civil limits of harmful behavior is best understood as a shorthand expression for achieving the goals of conflict resolution, moral blameworthiness and deterrence. Further, whatever purposes the establishing of standards through tort liability may serve, the tort system in action--as opposed to the tort system in theory--frequently fails to promulgate standards meaningful to potential defendants and those who must resolve tort liability disputes.

[4]See PROSSER & KEETON, supra note 1, at 608-15. See also Priest, The Intervention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. LEGAL STUD. 461, 465-83 (1985) (general history of tort law as a compensation system). See generally E. POLLACK & F. MAITLAND, A HISTORY OF ENGLISH LAW (2nd ed. 1905).

[5]See generally Schwartz, Foreword: Tort Scholarship, 73 CAL. L. REV. 548 (1985) (identifies revival of compensation objective in recent commentary). C.f., HARPER & JAMES, supra note 1, at 97 n. 3. (various viewpoints).

[6]A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMIC OF INJURY REPARATION; (1964) (empirical analysis of tort settlements in auto injury cases). [hereinafter cited as ECONOMICS OF INJURY REPARATION]. P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY, 4, 20-25 (1985). See R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) (discusses many studies that document that only a small percentage of all injured victims are actually compensated). See also D. HARRIS, M. MACTEAN, H. GENN, S. LLOYD-BOSTOCK, P. FINN, P. CORFIELD & Y. BRITTAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 45-65 (1984) (demographical study of factors associated with claiming and obtaining damages) [hereinafter cited as Harris]; P. MUNCH, COSTS AND BENEFITS OF THE TORTS SYSTEM IF VIEWED AS A COMPENSATION SYSTEM 13-15 (1977) (Rand Corp. Study) (examines large proportion of uncompensated or substantially undercompensated victims); Trubek, The Costs of Ordinary Litigation, 31 UCLA L. Rev 72, 85-87 (1983) (random sample of general population to empirically assess frequency of litigation).

[7]CALIFORNIA CITIZENS COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 10, 141 (1977) (tort system systematically overcompensates the slightly injured and undercompensates the seriously injured). See ECONOMICS OF INJURY REPARATION, supra note 6, at 185-189; Munch, supra note 6, at 13-15. See generally E. BERNZWEIG, BY ACCIDENT NOT DESIGN (1980) (addresses the limitations of tort law in compensating accident victims).

[8]See Sugarman, Doing Away With Tort Law, 73 CALIF. L. REV. 555, 592-93 (1985) (advocates comprehensive compensation for all injured victims); Accord Owen, Deterrence and Desert in Tort: A Comment, 73 CALIF. L. REV. 665, 667 n. 18 (1985) (supports comprehensive compensation but exposes logical limitations); See also Fleming, Is There a Future for Tort?, 44 LA. L. REV. 1193, 1203-04 (1984) (criticizes compensation methodology); Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 CALIF. L. REV. 772, 775 (1985) (exposes that only a purpose superior to accident victim compensation can adequately justify the present tort system).

[9]O. HOLMES, THE COMMON LAW 79 (1881). Holmes describes limited liability as "[t]he business of the law of torts is to fix the dividing line between those cases in which man is liable for harm which he has done, and those which he is not." Id. Cardozo asserted in Palgraf v. Long Island Railroad C., 248 N.Y. 339, 162 N.E. 99 (1928) that "[n]egligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right ..." Id. at 341, 162 N.E. at 101. See PROSSER & KEETON, supra note 1, at 160-165; HARPER & JAMES, supra note 1, at 381-89.

[10]See infra notes 11-14 and accompanying text. See generally J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 17 (1984) (the expense of this system prohibits access).

[11]See Rabin, The Historical Development of the Fault Principle: A reinterpretation, 15 GA. L. REV. 925 (1981); Schwartz, Tort Law and the Economy in Nineteeth-Century America: A Reinterpertation, 90 YALE L. J. 1717 (1981); Wigmore, Responsibility for Tortious Acts: Its History, 7 HARV. L. REV. 315 (1984); Winfield, The History of Negligence in the Law of Torts, 42 L. Q. REV. 184 (1926). See generally HARPER & JAMES, pra note 1, at 393-500.

[12]HARPER & JAMES, supra note 1, at 369-80. See Elwork, Juridic Decisions--In ignorance of the Law or In Light of It, 1 LAW & HUMAN BEHAV. 163 (1977); James, Functions of Judge and Jury in Negligence Cases, 58 YALE L. J. 667, 680-685 (1949). But see Railroad Company v. Stout, 84 U.S. 657, 663-64 (1837) (espousing the virtues of the jury system).

[13]O'Connell, A "Neo-No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898, 899 (1985). See e.g., J. O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN (1979); Franklin, Replacing the Negligence Lottery" Compensation and Selective Reimbursement, 53 VA. L. REV. 774 (1967).

[14]O'CONNELL, supra note 13, at 898. The present method of compensating accident victims is both wasteful and ineffectual. Id. See Sugarman, supra note 8, at 664.

[15]See generally Henderson, Process Constraints in Torts, 67 CORNELL L. REV. 901, 908-09, 912-22 91982) (recognizing the inherent limitations of accurate compensation under the negligence standard); Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L. J. 467 (1976) (criticizing the unpredictable application of the negligence doctrine); HARPER & JAMES supra note 1, vol. 4, at 563-83.

[16]See O'Connell, Alternatives to the Tort System for Personal Injury, 23 SAN DIEGO L. REV. 17, 19 (1986). See also Ingber, supra note 8, at 778-79.

[17]See Pedrick, Perspectives on Personal Injury Law, 26 WASHBURN L. J. 399, 399 (1987) (compensation for non-economic losses probably equals or exceeds compensation for economic losses). See, e.g., DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 220 (1981) (jury instruction for pain and suffering damages). cf. O'Connell & Simon Payment For Pain and Suffering: Who Wants What, When and Why? 1972 U. ILL. L. FOR. (1972). O'Connell found that most injury victims believed pain and suffering damages should be recoverable. Id. at 32, 49.

[18]J. O'CONNELL & C. KELLEY, THE BLAME GAME (1987). See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 540-50 (1973) (enumerates the kinds of injuries and the elements of recoverable damages commonly applicable in tort cases). See generally, A. SEDQEWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed. 1912) (describing the performulated measure of damages employed in Anglo-Saxon law).

[19]See, e.g. O'CONNELL, supra note 16, at 21. O'Connell asserts that only about 28 cents of every dollar spent on medical malpractice insurance, and only about 37 cents of every dollar invested in products liability insurance, are actually paid to injured claimants. Id.

[20]See O'CONNELL AND KELLEY, supra note 18, at 9-12 (criticizes costs and delays in evaluating claims).

[21]CALIFORNIA CITIZENS COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 10, 141 (177) (tort system pays less than half of the dollars it collects to injured victims and delays resolution without considering the financial ability of the injured to endure delay). See Sugarman, supra note 8, at 561. See also, ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEM, PRELIMINARY FACT-FINDING REPORT ON MEDICAL MALPRACTICE 198 (1987) (43.08% of medical malpractice liability insurance payments go to compensate claimants; remainder for insurance expenses and legal costs).

[22]See Sugarman, Serious Tort Reform, 4 SAN DIEGO L. REV. 795 (1987) (advocates an employment-based comprehensive compensation system for most accident victims); Sugarman supra note 8, at 555. See also HARRIS, supra note 6, at 327-49.

[23]Smith, The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law, 72 CORNELL L. REV. 765, 768-72 (1987).

[24]Id. at 772-75. PROSSER & KEETON, supra note 1, at 25-26. See Calabresi, Optimal Deterrence and Accidents 84 YALE L. J. 656,657 (1975) (considers fault system as a systm for achieving optimal deterrence in accident producing behavior). See generally G. Calabresi, infra note 27.

[25]Smith, supra note 23, at 772. See e.g., Estate of Cargill v. City of Rochester, 119 N.H. 661, 666, 406 A.2d 704, 706 (1979). "The threat of tort liability acts as an incentive for persons engaged in various activities to take steps to reduce the risk of injuries, ..." Id. at 666, 406 A.2d at 706. See also Calabresi, supra note 24, at n.1 & n.2.

[26]Smith, supra note 23, at 772. See also Calabresi, supra note 24, at 670-71 (Supports conduct-influencing role of tort law).

[27]Smith, supra note 23, at 772. The quintessential examination of the role of tort law in reducing accident and accident prevention costs is G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

[28]See Sugarman, supra note 8, at 564-91. (extensive critical analysis of tort law's deterrence of inprudent behavior). "[B]ased on a review of the literature, I conclude that theorists who would defend torts on deterrence grounds have no convincing empirical support for their position." Id. at 587. See also G. EADS & D. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 107 (1983) (Rand Corp. Study) (examines the difficult in resolving whether tort damages in an insured society have a deterrent effect). Cf. Pearson, Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell, 36 U. FLA. L. REV. 413, 417 (1984) (attacks the premise that law relating to damages for emotional harm influences human behavior).

[29]See infra notes 34-35 and accompanying text.

[30]See supra note 28. See also Brown, Deterrents in Tort and No-Fault: The New Zealand Experience, 73 CALIF. L. REV. 976, 1002, (1985) (challenging traditional theory of tort deterrence).

[31]See SMITH, supra note 23, at 772-73; Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 YALE L. J. 697, 710-719 (1978) (criticism of psychological assumptions underlying deterrence defense of contributory negligence doctrine). Cf. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 CALIF. L. REV. 677, 678 (1985) (criticism of behavioral assumptions in typical deterrence analysis).

[32]See SMITH, supra note 23, at 773.

[33]Id. at 773-74.

[34]See supra note 6 and accompanying text; Best & Anderson, Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress, 11 LAW and SOC'Y REV. 701 (1977); Pierce, Encouraging Safety: The Limits of Tort Law and Governmental Regulation, 33 VAND. L. REV. 1281, 1296 (1980). See also D. HARRIS, ET AL., COMPENSATION AND SUPPORT OF ILLNESS AND INJURY 317 (1984) (fewer than 1 in 50 accident victims compensated).

[35]See Smith, Rhetoric and Rationality in the Law of Negligence, 69 MINN L. REV. 277, 308-314 (1984) (analyzes consequences of nonassertion of claims and out-of-court settlement of claims on deterrence factor of tort law). See also note 7 supra.

[36]See Ingber, supra note 8, at 803.

[37]See Owen, supra note 8, at 667-68. See also ABA REPORT, supra note 1, at 4-170 to 4-175 (examines the punishment function of tort law.)

[38]REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY, 30-33, 61 (1986). See also, supra note 9 and accompanying text; Donoghue v. Stevenson, A.C. 562 (House of Lords 1932). Lord Atkin stated that what makes an action wrongful is "based upon a general public sentiment of moral wrongdoing for which the offender must pay." Id.

[39]See O'Connell, supra note 16, at 19; Sugarman, supra note 8, at 610 (criticizes punitive aspect of tort law that ascribes liability to persons or institutions for conduct that cannot be considered blameworthy). See generally G. CALABRESI; IDEALS, BELIEFS, ATTITUDES AND THE LAW 22 (1985) (demonstrates that liability may be imposed upon those who cannot be considered culpable).

[40]Henderson, 'Crisis' in Accident Loss Reparations Systems: Where We Are and How We Got There, 1976 ARIZ ST. L. J. 401. See de Carufel, Victims Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervention, 11 J. APP. SOCIAL PSYCH 445, 452 (1981) (analyzes social need to punish perpetrator of injustice). See also Fleming, supra note 8, at 573-81. (Liability insurance removes punishment function).

[41]See HOLMES, supra note 9, at 107-09. Holmes stressed over a century ago that fault when used in connections with tort doctrine cannot easily be equated with moral culpability. Id. See generally, PROSSER & KEETON, supra note 1, at 23, 534-538.

[42]See Posner, A Theory of Negligence 1 J. LEGAL STUD. 29, 31-32 (1972). See also PROSSER & KEETON, supra note 1, at 173-175.

[43]PROSSER & KEETON, supra note 1, at 534.

[44]Owen, supra note 8, at 669. (discusses the frequency with which tort sanctions are disproportionate to the level of fault). See generally, Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309 (1986) (criticizes modern law and economics doctrine).

[45]See Smith supra note 23, at 777-78. See also ABA REPORT, supra note 37, at 11-2 (describing the capacity of tort law to address multiple social objectives).

[46]See Sugarman, supra note 8, at 616 ("By trying to do too many different things, ... tort law ends up doing none of them well.") Cf. Fleming, supra note 8, at 1203 ("The more you fine-tune internalization or risk-avoidance, the more you get away from the principle of insurance, that is, risk-spreading.")

[47]See Smith, supra note 23, at 777.

[48]See Smith, supra note 23, at 777-78. (reviews arguments for disaggregation and assignnment of tort objectives to separation institutions); Owen, supra note 8, at 674 (arguing that a fair and efficient compensation system and an accident deterrence system are fundamentally distinct functions).

[49]Smith, supra note 23, at 766-67, 778-85 (argues that dispute resolution is the primary purpose of tort law). See Little, Up With Torts, 24 SAN DIEGO L. REV. 861 (1987) (defining civil limits on harmful behavior).

[50]The tort system provides the dual function of defining legal standards of reasonable human behavior and providing a remedy when those standards are violated. These two functions are inextricably intertwined. See infra note 52.

[51]Little, supra note 49, at 863-65;S. KIESLER, INTERPERSONAL PROCESSES IN GROUP AND ORGANIZATIONS 96 (1978). See also R. BIERSTEDT, THE SOCIAL ORDER 175 (1957) (describes the social norm as a standard or cultural specification that guides our conduct in society).

[52]See Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 372 (1978). "The object of the rule of law is to substitute for violence peaceful ways of settling disputes." Id. See also Alschuler, Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases, 99 HARV L. REV. 1808, 1815-16, (1986) (recognizes the peacekeeping role of dispute resolution). The function of providing standards cannot be explained simply as adopting a free-standing code of substantives rules, because, to a large extent, the standards are developed through the process of resolving disputes in individual cases. The function of resolving disputes cannot be explained simply by reference to the judicial process in civil cases generally, because tort law has developed intricate internal conventions for allocating the functions of judge and jury, assigning and weighing the burdens of proof, and determining the admissibility of evidence. See generally L. GREEN, THE LITIGATION PROCESS IN TORT LAW (2nd ed. 1977).

[53]See supra note 1 and accompanying text.

[54]See infra note 55-61 and accompanying text.

[55]See Smith, supra note 23, at 780-81. Violation of trivial norms results in less formal sanctions like social disapproval. Id. See also Inkeles & Levinson, National Character: The Study Of Model Personality and Sociocultural Systems, THE HANDBOOK OF SOCIAL PSYCHOLOGY 418, 471-72 (G. Lindzey & E. Aronson eds. 1969) (All societies include additional instrumentalities, social sanction, for inducing socially acceptable behavior.) See generally, E. ARONSON, THE SOCIAL ANIMAL 147-51 (4th ed. 1984) (addresses the function of social pressure in reinforcing general social norms).

[56]See S. KIESLER, supra note 51, at 120-121. Choice involves competing concerns that requires a method of resolution when conflict arises, particularly when norms are violated. Id. See also M. DEVTSCH, DISTRIBUTIVE JUSTIVE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE 181 (1985). "Members of a group who accept common morms of justice also share obligations to protect these norms and to respond to their violation." Id. Little, supra note 49, at 864-65. See also L. GREEN, supra note 52, at 639-45.

[57]See Miller & Vidmar, THE SOCIAL PSYCHOLOGY OF PUNISHMENT REACTIONS IN THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR 155 (M. Lerner & S. Lerner eds. 1981). "Laws and rules derive from social groups. In addition to providing behavrioral prescriptions, they help to define the boundaries and the social reality of the gorup... Violation of these laws or rules constitutes a threat to the group." Id. See also R. BIERSTADT, supra note 51, at 183 (describes the role of dispute resolution as applied to those who violate norms).

[58]See supra notes 49-57 and accompanying text. See also Smith, supra note, 23 at 778-85.

[59]See generally PROSSER & KEETON, supra note 1, at 1-1072. This venerated handbook provides a fundamental understanding of the legal standards expressed and enforced by the tort legal system.

[60]See L. GREEN, supra note 52, at 513-638. R. KEETON & J. O'CONNELL, supra note 6, at 69-71, 228-29 (examines enormous expense of tort system). See also E. BERNZWEIG, supra note 7, at 85-89 (1980) (discusses tort law's administrative cost). See generally J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING VARIOUS TYPES OF CIVIL CASES (1983) (Rand Corp. Study) (considers the substantial public expense of the judiciary in operating the tort system).

[61]See Smith, supra note 23 at 796-98. Removing the function of tort law would lead to social disintegration.

[62]See supra note 49-61 and accompanying text.

[63]See Smith, supra note 23, at 786-94.

[64]See supra note 6 and accompanying text.

[65]See PROSSER & KEETON, supra note 1, at 23. "Trivialities must be left to other means of settlement, and many wrongs which in themselves are flagrant ... are beyond any effecitve legal remedy, and any practical administration of the law." Id.

[66]Id. "It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many casts of ascertaining the real facts or of providing any effective remedy, have meant that there must be some selection of those more serious injuries which have a prior claim to redress ...." Id. See Little, supra note 49, at 864-65, 869.

[67]Smith, supra note 23, at 779-82.

[68]See Vidmar, Justice Motives and Other Psychological Factors in the Development and Resolution of Disputes, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR. 395, 403 (M. LERNER & S. LERNER EDS 1981). The social perception of injustice has recently been studied by social psychologists. See e.g., M. DEVTSCH, supra note 56, at 180-95. See generally E. CAHN, THE SENSE OF INJUSTICE 13 (1949) (arguing that the sense of injustice is a familiar and observable social phenomenon).

[69]See supra notes 56 & 61 and accompanying text. cf. ABA REPORT, supra note 37, at 3-29 (describing the role of tort law as a reflector and enforcer of social standards of conduct).

[70]See generally PROSSER & KEETON, supra note 1, at 173-93.

[71]Id. at 698-99.

[72]See supra notes 39-44 and accompanying text.

[73]See supra notes 49-51 and accompanying text.

[74]See supra notes 55-65 and accompanying text.

[75]See PROSSER & KEETON, supra note 1, at 169-193.

[76]See supra notes 49-58 and accompanying text.

[77]See supra notes 51-61 and accompanying text.

[78]See supra notes 55-58 and accompanying text.

[79]See Keeton, Thoughts on Tort Reform, 18 ST. MARY'S L. J. 669 672 (1987) (recommends reexamination and reform without jettinsoning the entire tort system); Little, supra note 49, at 862-63, 689.

[80]Sugarman supra note 8, at 564, 81.

[81]See Sugarman, supra note 8, at 642-64. See generally, E. JOHNSON, V. KANTOR 7 E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977) (considers alternative dispute resolution methods).

[82]See Sugarman, supra note 8, 623. (workers' compensation was meant to asssure compensation for basic economic loss). See also Epstein, The Historical Origin and Economic Structure of Workers Compensation Law, 16 GA. L. REV. 775 (1982); ABA REPORT, supra note 1, at 10-49. The systems number of filings has been criticized as "five times too many for the health of the court, for the health of the system, and for the health of the parties ... waiting months for benefits ...." Id. quoting from Yates, 1st D.C.A. Conference Addresses 'Intolerable' Workers' Compensation caseload, 9 Fla. Bar News No. 15 at 1 (Aug 15, 1982). See generally Love, Actions for Nonphysicial Harm: The Relationship Between the Tort System and No-Fault

Compensation, 73, CALIF. L. REV. 857 (1985) (emphasis on workers' compensation).

[83]See Scholz, Cooperation, Deterrence and the Ecology of Regulatory Enforcement, 18 LAW & SOC'Y REV. 179 (1984) (analysis the advantages of cooperative regulatory enforcement strategies). "Unlike the tort system ... agencies can choose from criminal sanctions, civil penalties, warnings, recalls, injunction-like remedies, negotiated solutions, and court orders. Sugarman, supra note 8, at 657. See also Pierce, Institutional Aspects of Tort Reform, 73 CALIF. L. REV. 917, 932 (1985) (hypothesizes a legislatively created tort agency).

[84]Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 1970 U.S. Code Cong. & Ad. News, 91st Cong., 2nd Session, P. 1852-1887. See M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW (2nd ed. 1980) (handbook reveals complexity of administration). See generally, ABA REPORT, supra note 1, at 10-81 to 10-88; J. MENDELOFF, REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1979).

[85]Hutchinson, Beyond No-Fault, 73 CALIF. L. REV. 755, 764 (1985). Even when a compensation scheme is sufficiently comprehensive and adequately financed, it requires a massive regulatory structure to administer the available benefits. Id. See also Simon, Legality, Bureacracy, and Class in the Welfare System, 92 YALE L. J. 1198, 1199 (1983) (identifies the necessary and expanisve heirarchical organization).

[86]O'Connell, Financing First-Party No-Fault Insurance by Assignment of Third-Party Tort Claims, 663 INS. L. J. 207 (1978).

[87]See O'CONNELL, supra note 6, at 209-10.

[88]Henderson, supra note 40 at 401-408. See W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 7-17 (3rd ed 1971) (society in early England had no public or private insurance system over which the risks of accident losses could be transferred and distributed). See also Malone, Luminations on the Role of Fault in the History of the Common Law of Torts 31 LA. L. REV. 1-2, 9 (1970) (documents ancient tort systems methods of compensation).

[89]See Henderson, supra note 40, at 407, 411-412. In the early twentieth century, "tort law and liability insurance merged into a symbiotic relationship--tort purporting to shift losses from the guiltless to the guilty and liability insurance transferring the losses from the guilty back to the guiltless. Id. at 412.

[90]1986 Fla. Laws, Tort Reform and Insurance Act of 1986, Pub. L. No. 86-160, 965-764.

[91] Id. at 698. "WHEREAS, the Legislature finds that certain commercial liability insurers are threatening to make insurance coverage less available and less affordable, which will seriously effect many sectors of Florida's economy ..." Id.

[92] Id. at 699. "WHEREAS, the Legislature finds that tort law and the liability insurance system are interdependant and interrelated ..." Id.

[93] Id. at 698. "WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil action will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses ..." Id.

[94] Id. "WHEREAS, the Legislature believes it is necessary to avoid an insurance availability crisis, to maintain economic stability, and to protect the people's right to affordable insurance coverage..." Id.

[95] Tort Reform and Insurance Act of 1986, §60, ch. 86-160, Laws of Florida.

[96] Several elements have not been independently evaluated because their function is to make other elements work properly. These include itemized verdicts (Fla. Stat. §768.77 (1986 Supp.) and optional settlement conferences (Fla. Stat. §768.75 (1986 Supp.)

[97] Fla. Stat. §768.76 (1986 Supp.)

[98] Fla. Stat. §768.81 (1986 Supp.)

[99] Fla. Stat. § 768.80 (1986 Supp.) (This measure was ruled unconstitutional by Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), but has been retained as a study element on the assumption that it could be validated by constitutional amendment.)

[100] Fla. Stat. §768. 73 (1986 Supp.) (The basic limitation is tha punitive damages are not to exceed three times actual damages, but the trial judge has discretion to award more.)

[101] Fla. Stat. §768. 79 (1986 Supp.)

[102] Fla. Stat §768. 78 (1986 Supp.) (The provision applies to future economic damages exceeding $250,000 and is discretionary with the judge.)

[103] Fla. Stat. §57.105 (1986 Supp.) (The 1986 amendment subjects lawyers to potential liability, which was not permitted before.)

[104] Fla. Stat. §768. 74 (1986 Supp.)

[105] Fla. Stat. §768. 77 (1986 Supp.) (The Task Force deemed this provision to be a necessary element of the several liability and structured settlement provisions and made no attempt to evaluate it independently.)

[106] Thirty-one of the largest liability insurers were surveyed. Twenty three returned answers to these particular inquiries.

[107] With the assistance of the Florida Bar Trial Section, the Florida Defense Lawyers Association and the Florida Academy of Trial Lawyers, the Task Force obtained a list of 300 seasoned (82% in practice over 10 years) lawyers, closely balanced between defendants' and plaintiffs' lawyers. More than two-thirds returned completed surveys.

[108] The survey was distributed before the cap was declared unconstitutional. Only one or two late returns noted the intervening judicial invalidation.

[109] Of those replying, 88% spent more than 60% of their time on torts work. About 53% represented plaintiffs predominantly or exclusively; 41% represented defendants predominantly or exclusively; and 6% represented each side about equally. The surveyees had had actual involvement with the new measures as follows: collateral source offsets (95%); several liability (66%); punitive damage limitations (42%); offer and demand for judgment provisions (58%); structured awards (13%); attorney fee shifting (15%); and remittitur and additur provisions (22%).

B. Specific Tort Law Revision

The recommendations in this section concern specific changes in Florida tort law. Subsequent sections address the issue of whether the common law tort system should be replaced with an alternative compensation system (such as a "no fault" compensation plan)[1] and recommendations regarding the litigation process.[2] The Task Force members and the Research Staff evaluated a wide variety of possible changes in Florida's tort law which are not reflected in these recommendations,[3] in most instances either because existing law was found to be adequate or because liability insurance problems were not found to be severe enough to justify changes.

1. Joint and Several Liability and Comparative Fault

The Final Fact Finding Report discusses the Florida rule of pure comparative negligence, the common law doctrine of joint and several liability, and the 1986 statute adopting modifications in joint and several liability.[4] Since that report was written, the Florida Supreme Court has declined[5] to abrogate the rule of joint and several liability as the underlying law of liability in Florida when multiple wrongdoers are responsible for a plaintiff's indivisible injuries (as modified by the 1986 Act). The Court was unable to conclude that "joint and several liability is an unjust doctrine" or "that it necessarily should be eliminated upon the adoption of comparative negligence," but did conclude that "in view of the public policy considerations...the viability of the doctrine is a matter which should best be decided by the legislature."[6]

Moreover, the Court expressly noted that the Academic Task Force had been created "to study and make recommendations to the legislature concerning all aspects of tort and insurance law."[7]

In the following two subsections, this report analyzes the issues of comparative negligence and joint and several liability and offers recommendations for modification of the 1986 Act.

a. Modified Versus Pure Comparative Negligence

In 44 states some form of comparative negligence has replaced the common law rule that contributory negligence, however slight, bars all recovery.[8] Nevertheless, only 14 states employ a pure comparative negligence rule similar to that applied in Florida,[9] and the remainder employ some version of modified comparative negligence. Under a modified comparative negligence rule the percentage of negligence attributable to a plaintiff is tested against a threshold. If a plaintiff's allocation exceeds the specified threshold, the action will be totally barred, but if the negligence is less than the threshold, the plaintiff's recovery is diminished proportionately. The most common thresholds are that the plaintiff's negligence must be less than that of the defendant's (49% rule),[10] or that the plaintiff's negligence must not be more than the defendant's (50% rule).[11] Three states follow some version of a "slight/gross" rule, which bars liability unless the plaintiff's degree of negligence is demonstrably less than that of the defendant under various formulations.[12]

The underlying rationale of all modified comparative negligence schemes is that a defendant may not justly be held

liable to a plaintiff whose own fault exceeds some prescribed threshold amount. To the extent of the threshold, it perpetuates the common law view of individual responsibility that makes each person primarily accountable for his own failure to look after his own interests. In states where comparative negligence has been adopted by statute, modified comparative negligence is far and away the preferred approach[13]; whereas in states where it has been imposed judicially, pure comparative negligence is most frequently adopted.[14] The apparent judicial preference for the pure variety may be influenced by the quite obviously legislative character of the choices that must be made in putting a modified plan into effect. The most recent development in the field is the Illinois legislature's enactment of a 50% Rule modified statute to override the judicially adopted pure rule.[15] This repeats a much earlier movement in Arkansas, one of the earliest comparative negligence jurisdictions, away from a pure comparative negligence statute to a 49% Rule modified statute.[16]

The adoption of modified comparative negligence would, in theory, preclude any recovery in some cases involving a high percentage of negligence by the plaintiff, where some award of reduced damages is now possible under Florida's pure comparative negligence rule. However, the Task Force has no empirical evidence as to which form of comparative negligence makes liability insurance more available or more affordable. Rather, the Task Force recommends adoption of modified comparative negligence, because it more effectively serves the fault based premises of individual responsibility in tort law.

Based upon a consideration of all these factors, the Tas] Force recommends that the comparative fault provisions[17] of th 1986 Act should be replaced with modified comparative faul provisions that incorporate the following features.

1. No plaintiff may recover in an action brought ir negligence, product strict liability, and breach of implied warranty, including wrongful death actions brought under those theories, if the plaintiff's percentage of fault was more than the cumulative percentage of fault allocated to all defendants in the action.
2. The jury should be informed of the effects of its findings on the entitlement of the plaintiff to recover.

b. Joint and Several Liability

Both basic forms of comparative negligence impose numerous secondary policy choices for decision-makers. The most important issue is how multiple tortfeasers share the financial liability for injuries to the claimant. The traditional common law approach was one of "joint and several" liability in which any one of the defendants was liabile for the entire amount of the plaintiff's judgment. The plaintiff could collect only once for his damages, but his recovery of full damages was facilitated even in the event that one of the co-defendants was judgment-proof or beyond the jurisdiction of the court. In recent years, some courts[18] and legislatures[19] have taken the opposite approach of pure several liability[20] which provides that a defendant is only liable for a proportionate share of the judgment based upon

a comparison of its relative degree of fault compared with the other defendants. Mosts states currently retain joint and several liability,[21] but a few statutes impose only several (proportionate) liability upon a defendant whose negligence was less than the plaintiff's and joint and several as to all the rest.[22]

A survey of 1987 legislation shows that fourteen states enacted laws modifying the common law of joint and several liability. Five of these adopted pure several (proportionate) liability, two adopted some version of reapportioned several liability, and seven adopted some kind of hybrid, modifying joint and several liability short of pure proportionate liability.[23]

Florida's 1986 Act[24] adopts several (proportionate) liability, except for intentional torts, designated statutory torts, negligence judgments not exceeding $25,000, and for economic damages as against a defendant who is not less negligent than plaintiff. Joint and several liability is retained for the excepted categories.

The Task Force has considered a range of alternatives, including joint and several liability, several (proportionate) liability, reapportioned (percent of a percent) several liability, several (proportionate) liability for defendants less at fault than plaintiff, no liability for defendants less at fault than plaintiff, as well as retaining the basic scheme of the 1986 Act.

The basic argument in favor of abolishing joint and several liability is that, once the comparative fault principle is

accepted as governing liability, no defendant should have to pa more than the share of damages that corresponds to his share c fault. The argument for retaining joint and several liabilit emphasizes that each defendant was a necessary cause o plaintiff's indivisible injury (regardless of how relative faul is assigned) and should be held accountable so as to provide th optimal opportunity for plaintiff to collect his net damage awar (after the appropriate deduction for his comparative negligence)

Hybrid statutes, like Florida's 1986 Act, obviously striv for some appropriate balance between these competing policies, a recommended by the American Bar Association's Report on th Action Commission to Improve the Tort Liability Systems (1987).[2 The retention of joint and several liability for smaller case attempts to enhance collection and avoid complexity in those cases, while still providing protection against the potential inequity of "deep pocket" liability for the entire judgment in larger cases where that is more likely to be a serious problem. The retention of joint and several liability for economic damages, as applied to a high-fault defendant, recognizes an implicit priority for economic losses and applies it so as to avoid the potential inequity of "deep pocket" liability for a defendant who is less at fault than the plaintiff.

The Task Force generally believes that this balanced policy choice should be given a chance to work. It recommends that the statutory threshold should be raised from $25,000 to $50,000, in order to approximate more closely the point at which overriding concerns about the potential inequity of "deep pocket" liability are likely to become important.

2. Retailer's Liability for Defective Products

Although various interests have expressed concern over the relatively new theories of strict liability for harm caused by defective products, the empirical evidence available to the Task Force does not demonstrate that these theories have driven the price of liability insurance and self-insurance to unaffordable heights or dried up the availability of insurance in Florida.[26] Consequently, the Task Force is not recommending modification of these statutory and judicial theories that have been adopted for the express purposes of putting the risk of dangerous defects in products upon the entities that are best able to avoid harm by detecting and eliminating defects at the origin and to spread the losses caused by uncorrected defects by distributing them to all consumers through product prices.

The Task Force specifically considered the question of applying strict liability in tort to product sellers who are retailers, as distinguished from manufacturers.[27] The Florida Supreme Court has not explicitly decided whether this strict liability in tort applies to retailers.[28]

Decisions whether retailers should be strictly liable in tort for defective products implicate many important factual variables; including whether the victim is a bystander or the buyer (or someone in close relation to the buyer), the size and operational methods of the retail institution, whether the retailer performs some manufacturing function or controls design specifications and whether he does so at the buyer's request, whether the manufacturer is subject to suit in Florida or would

be able to pay the judgment, and the need to resort to "vouching in" more remote parties in the chain of commerce in order to obtain effective relief. These variables may be better left for judicial decision on a case-by-case basis. Therefore, the Task Force has decided to make no legislative recommendation.

3. Liability of Managing Co-Employees

The Task Force has examined recent decisions affecting the exclusivity of workers' compensation for employees' work-related injuries. In a pair of 1987 cases[29] the Supreme Court declined to decide whether an employers' intentional tort against an employee would subject the employer to tort liability notwithstanding the statutory exclusivity principle, but in doing so imposed upon "intentional" the standard that "the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death."[30] The court also stated that a "strong probability is different from substantial certainty and cannot constitute intentional wrong doing."[31] Under this test an employer does not commit an intentional tort when he orders an employee into a pipe which the employer knows to be filled with dangerous gas that may result in injury to the employee[32] nor when he instructs an employee to operate dangerous machinery without warning the employee about the machinery's known hazards.[33]

By contrast, the Supreme Court recently construed the statutory provision that holds fellow employees liable in tort for harm done other employees by acts that are done with "willful and wanton disregard or unprovoked physical aggression or with gross negligence"[34] to permit an employee to sue a

managing co-employee for harm resulting from grossly negligent policy decisions.[35] Under this ruling, the plaintiffs were permitted to attempt to persuade juries that managing co-employees were grossly negligent in making policy decisions to reduce the level of security provided employees[36] and to require employees to violate motor carrier safety regulations.[37]

Although the dissenting justices in these latest decisions opined that the rulings would "have a substantial economic impact, since they will provide employees a means to litigate a decision by corporate officers to reduce the work force,"[38] the Task Force has no empirical basis to quantify this effect upon the cost of insurance or self-insurance. Nevertheless, the Task Force sees a genuine policy conflict between the workers' compensation exclusivity principle and a doctrine that subjects management-employees to liability for grossly negligent policy decisions that expose workers to the risk of harm.

The Task Force recommends that the statutory provision relating to the liability of co-employees be amended to delete the reference to "gross negligence" and to substitute "knowing violation of safety statutes or regulations."

4. Dog Owner's Liability Statute

The Florida dog owner's liability statute[39] makes dog owners strictly liable for dog bites without application of the "first bite rule," subject to certain provocation defenses.[40] The statute completely exonerates dog owners of any liability for harm done to persons on the owner's property if the owner has prominently displayed a "Bad Dog" sign on his premises.[41] The

Task Force recommends that both portions of this statute b amended to alleviate unnecessarily harsh consequences.

First, the statute creates an absolute defense for th owners of any dog "to any person or his property when such perso shall mischievously or carelessly provoke or aggravate the do inflicting such damage."[42] The Florida courts have held tha this aggravation defense applies no matter how young the perso who purportedly provoked or aggravated the dog, includin children of "tender years" (i.e. four years old).[43] The Tas Force recommends that the statute be amended to eliminate th provocation or aggravation defense as to any person under si years of age.

Second, because the Florida Supreme Court has held that the mere presence of a "Bad Dog" sign posted as prescribed by the statute will conclusively shield the dog owner from liability, no matter how negligent the owner may have been in particular circumstances,[44] it may follow that innocent persons will sometimes be exposed to negligent attacks with impunity to dog owners, including those who keep vicious dogs for security purposes. The Task Force believes this statute provides too little protection to people lawfully upon the owner's premises and recommends that portions of the dog bite statute be amended so as to limit the owner's liability to a negligence standard if a valid "Bad Dog" sign has been posted.[45]

5. Limitations on Non-Economic Damages: Negative Recommendations

The Task Force has previously considered legislation to limit the amount that could be awarded for non-economic damages

in tort cases. In connection with its Medical Malpractice Recommendations, the Task Force recommended "rejection of a plan that would limit recovery of non-economic damages to $100,000 in all tort cases, including claims for medical negligence."[46] Two reasons were given for the negative recommendation: first, that "cost savings from this proposal would be achieved solely by penalizing the most seriously injured victims," and second, that "the $100,000 cap is too low ... and removes recovery for legitimate damages in many cases without providing offsetting benefits for plaintiffs."[47]

The Task Force did recommend adoption of a conditional limitation on non-economic damages, but only as part of an integrated plan to provide special incentives for early arbitration of medical malpractice claims without having to prove fault.[48] This recommendation was explicitly based upon specific findings that the severity of loss payments for medical malpractice claims and the resulting increases in the cost of malpractice liability insurance were far greater than in other areas of tort liability.[49] The savings to be realized from expedited resolution of simplified claims were at least as important in prompting this recommendation as any expectation of reduced liability payments directly attributable to the cap on non-economic damages.[50] Moreover, linking the conditional cap to an opportunity to receive damages without proof of fault was considered to be essential, not only as a matter of fundamental fairness, but also to satisfy Florida's constitutional restraint against limiting damages without providing commensurate benefits.[51]

Therefore, the previous recommendations of the Task Force do not imply support for imposing caps on non-economic damages in all tort cases, and do reject a cap as low as $100,000, in any event. The remainer of this section considers whether the Task Force should endorse a higher cap to be applied unconditionally to all tort cases (along with a constitutional amendment to validate it), and whether it should recommend a conditional cap for cases other than medical malpractice claims.

a. The Effects of Caps

Most studies of the effects of caps have been limited to medical malpractice claims.[52] This suggests a need for caution in generalizing from those studies, because Task Force findings have shown that the average severity of medical malpractice awards is much higher than the average award in other tort areas,[53] and that high-end awards have exerted a disproportionate influence on total loss payments for medical malpractice liability insurance.[54] Therefore, it should be expected that a cap on non-economic damages would have a greater impact on medical malpractice liability insurance costs than upon liability insurance costs in other areas of tort law.

A recent study commissioned by Insurance Services Office suggests doubt as to whether a $450,000 cap in Florida (assuming its validity) would have any substantial effect, as estimated by senior claim professionals, on the indemnity value of six standardized claim situations.[55] The standardized claim situations were all claims for bodily injury, larger in money value than most claims. They included claims arising out of

premises, products, and traffic accidents, but no medical malpractice cases.

The Task Force has not previously published estimates on the projected effects of caps in Florida, because adequate and reliable information is not available as to the distribution of economic and non-economic losses in past paid claims data. However, the data published in previous fact-finding reports will support a reasonable inference that a statutory cap on non-economic damages would probably have a more substantial effect upon medical malpractice claims than upon other liability lines.

The average amount paid on Florida medical malpractice claims in 1986 was $121,073 per claim,[56] while the corresponding figure for other liability lines was between $7,000 and $15,000.[57] The average was $6,444 for the products liability subline and $5,134 for owners, landlords and tenants.[58] A cap on non-economic damages, even as low as $100,000, would have no direct effect upon average size claims in these other liability lines. Even more revealing are the facts that in medical malpractice 9.15% of the number of paid claims exceeded $250,000,[59] and paid claims over $1,000,000 accounted for 29.1% of total amounts paid,[60] A cap on non-economic damages could have an effect on most of these larger malpractice claims, depending upon the level of the cap and the distribution between economic and non-economic damages. But in other liability lines only 0.22% of paid claims exceeded $250,000.[61] Therefore, only a very small portion of liability payments on other liability lines could be affected by a cap on non-economic damages, regardless of the distribution between economic and non-economic losses.

In an effort to corroborate this conclusion, the Task Force has attempted to estimate the relative magnitude of the effect (impact) of a cap on other liability lines as compared with the medical malpractice line. Caution must be exercised in the interpretation of these results, for several reasons. First, the estimates are based upon hypothetical assumptions (rather than empirical data) as to distribution of economic and non-economic losses in past paid claims data. Second, the estimates are based upon a retrospective analysis, to measure how several levels of caps might have affected past loss payments. There is no way of knowing how future loss payments would be changed by conditions that have changed since the closed claims data were reported.

With these limitations in mind, the Task Force made a retrospective analysis of how past loss payments (1981-85) for medical malpractice claims and other liability lines in Florida might have been affected if caps on non-economic damages at assumed levels of $250,000 or $350,000 would have been applicable. With a $250,000 cap on non-economic damages, loss payments would have been reduced by about 11 percent for medical claims but only 2 percent for other liability lines, assuming a 1 to 1 ratio of non-economic losses and economic losses. With a $350,000 cap on non-economic damages, the corresponding figures would be approximately 7 percent for medical claims and only 1.6 for other liability lines. The numbers change, but the relative magnitude remains about the same, if it is assumed that the ratio of non-economic losses to economic losses would be 1 to 2. The estimated reduction in loss payments would then be approximately

4.2 percent for medical and only 1 percent for other liability lines, with a $250,000 cap; or it would be approximately 2.4 percent for medical and only 0.7 percent for other lines, with a cap of $350,000. These results are displayed in graph form on the following page.

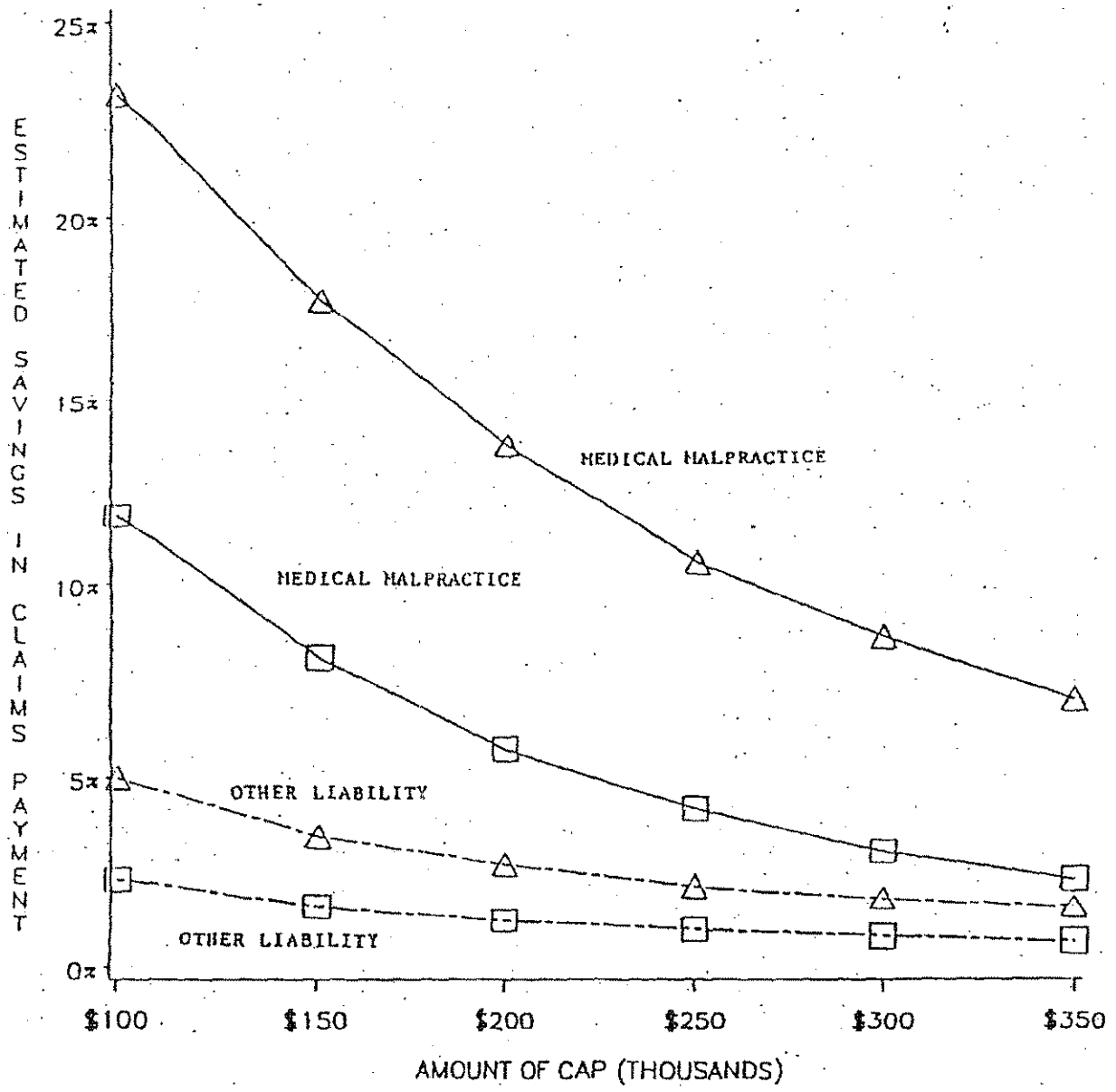
In each instance, savings from a cap on medical claims would be from four to five times greater, in relative magnitude, than savings from the same cap on other lines. For reasons explained above, these figures are offered only for what they say about relative magnitude. They should not be misinterpreted as vouching for the amount of savings that might be realized from caps on non-economic damages.

b. Negative Recommendations

Considering the above facts, the Task Force concludes that it should not recommend adoption of an unconditional limit on non-economic damages in all tort cases. The potential savings in lines other than medical malpractice do not appear to be high enough to justify restricting traditional rights to full reparation for those victims most severely injured, nor to justify abrogration of jury trial rights.

For similar reasons, the Task Force does not recommend a conditional limit on non-economic damages, such as that previously recommended for medical malpractice claims, for use in other areas of tort liability. As previously explained, that recommendation was part of an integrated proposal specifically aimed at the higher average awards and the disproportionate impact of high-end awards in the medical liability area. The use of conditional limits on non-economic damages was considered

ESTIMATED IMPACT OF CAPS ON NON-ECONOMIC DAMAGES:
MEDICAL MALPRACTICE VERSUS OTHER LIABILITY LINES, FLORIDA (1981-85)



SOURCES: MEDICAL MALPRACTICE = Florida Department of Insurance Medical Malpractice Closed Claims Data Set.
OTHER LIABILITY = Florida Department of Insurance One-time Closed Claims Surve

NOTE: These results depend upon an important assumption concerning the distribution of economic and non-economic damages. Please refer to the text for a discussion of this point.

necessary to provide adequate incentives for arbitration and early resolution of medical claims in order to reduce especially high litigation costs.[62] Similar caps would probably not provide that much added incentive to arbitrate claims in other liability lines. The intricate arrangements needed to implement and enforce the prompt investigation provisions of the medical malpractice proposal were justified, because of their potential to reduce very high litigation costs through prompt elimination of non-meritorious claims and earlier resolution of meritorious claims.[63] In other liability areas, the same objectives would be abstractly desirable, but, because of smaller claims and lower litigation costs, the same elaborate pre-suit screening procedures might actually cost more than they would save.

The $450,000 cap on non-economic damages (F.S. 768.80), enacted by the Tort Reform and Insurance Act of 1986, has already been held unconstitutional. The "sunset" provision (Section 65) of the 1986 Act will automatically repeal this cap on July 1, 1990. Since the Task Force does not recommend enactment of a cap on non-economic damages, F.S. 768.80 should be immediately repealed or allowed to expire in 1990 under the "sunset" provision.

6. Periodic Payment of Future Economic Losses

The use of periodic payments for future economic losses may produce substantial cost savings for those who pay tort claims without impairing the reparative objective of tort law. The potential savings result in part from favorable tax treatment and in part from the fact that the actual market price for an annuity

to cover periodic payments may be substantially lower than the lump sum payment of the estimated present value of future losses. These savings may be realized either in connection with tort judgments after trial or in connection with negotiated structured settlements. Because many more claims are disposed of by settlement than by judgment, structured settlements offer the greater potential for aggregate savings.

The Tort Reform and Insurance Act of 1986, Florida Statutes 768.78, authorizes the court to order periodic payment of future economic losses in excess of $250,000, at the request of either party. For reasons explained later, the statute is not as effective as it could be, and proposed amendments will be recommended. The statute is important, not only for its direct effect on claims that go to judgment, but also for its indirect effect of encouraging greater use of periodic payments in connection with structured settlements. Because greater aggregate savings may be realized in connection with structured settlements, this report will first explain the potential savings in that context. Then this report will discuss the reasons for amending the statute providing for periodic payment of judgments.

a. Structured Settlements

A structured settlement is defined as any negotiated arrangement for the payment of a tort claim other than by a single lump-sum payment.[64] Typically, after the plaintiff and defendant's insurer have agreed upon a series of payments in settlement of the case, the defendant's insurer funds the agreement through the purchase of an annuity. The use of

structured settlements offers significant benefits for claimants. Most important, structured settlements offer a guaranteed sum of money for life on a tax-free basis with a potential payout far in excess of the original settlement amount. In addition, there is assurance that proceeds of the settlement will not be dissipated due to inexperience in financial management, fraud or some other reason. Finally, management of the funds is provided by a third party thereby relieving surviving beneficiaries of the responsibility of initial investment and subsequent reinvestment of funds. Insurers benefit from structured settlements because of savings in claims costs as well as loss adjustment expenses. In short, structured settlements offer a means of providing higher after-tax benefits to claimants while offering potential reductions in the overall cost of the tort and insurance system.

In a traditional cash settlement of a personal injury claim, the amount received by the claimant in settlement of damages on account of personal injuries or sickness is excludable from gross income.[65] However, depending upon the securities selected and the individual's personal tax circumstances, the income produced by the investment of the cash settlement is taxable.[66] The favorable tax treatment for periodic payments arises because the claimant is held not to have actual or constructive receipt of the lump sum that was invested to produce the $1,000 monthly benefit.

Structured settlements offer potential savings both from reduction in the total cost of indemnity payments and from reduction in defense expenses. Savings in indemnity payments result from at least two sources; discontinuation of expenses

which are no longer required and the use of actual market prices in arriving at the present-value of a stream of benefits. An example of expenses which could be discontinued upon the death of the claimant are future medical expenses. Traditional damage calculations may include an allowance for future medical expenses without adjustment for the fact that they will stop upon the death of the claimant. Because a structured settlement agreement may consist of a number of separable parts, one of which would be the expected cost of future medical expenses, the present value of that cost can be determined upon the basis that the payout will cease when the claimant passes away. The cost of this benefit will be lower than one which does not recognize this possibility. Another part of the agreement may provide for the replacement of lost income and this benefit could extend beyond the claimant's death to normal retirement age.

In summary, specific financial needs of the individual can be addressed and funded separately using structured settlements. Under this approach, funds which are necessary solely to treat the injured claimant, e.g. future medical expenses, are utilized explicitly and exclusively for this purpose. Contrast this outcome with a lump-sum settlement for future medical expenses which becomes a windfall payment for the claimants' heirs if the claimant dies relatively soon after the settlement is reached.

Another potential source of savings derives from the way the present value of future benefits is determined for the purpose of lump payments. In the traditional settlement process, the plaintiff's attorney may hire an expert to assess future needs

and reduce them to a present value. The defendant's insurer will undertake a similar process using its expert. Neither expert, however, actually determines a market price for an annuity providing the stream of benefits. The actual market price for such an annuity may be substantially less than the present value of future losses as calculated by the experts.[67]

b. Periodic Payment of Judgments

The 1986 Tort Reform and Insurance Act created Florida Statute 768.78 which provides for periodic payment of future economic damage awards. Under this section, periodic payment of future economic damages may be requested by either party and this request must be allowed unless it can be shown that such a method of payment would result in "manifest injustice". Future economic damages must exceed $250,000 before periodic payments may be proposed and then only the amount in excess of $250,000 is subject to periodic payment. There is no provision in the statute for the periodic payment of non-economic damages.

The time period of payment is determined by the court and payments will not be continued beyond this term if the claimant survives past the end of the period. If the claimant dies before the end of the period, the defendant is required to pay the present value of the remaining payments to the estate of the claimant in a lump sum. There is no mention in the statute of how to select an appropriate interest rate for determining present value.

In the event of periodic payment of the award, responsibility for the claimant attorney's fee is divided between the claimant and the defendant. The claimant is responsible for any

contingency fee payable on that portion of the award which is not subject to periodic payments. The defendant is responsible for making a lump-sum payment of the remaining fee and is entitled to a corresponding percentage credit on subsequent periodic payments.

Assurance of the payments by the defendant is addressed in the statute by requiring that a bond or other security be posted. Finally, the statute permits any other method of payment of awards, provided that it is agreed to by the parties.

The Task Force's Research Staff heard opinions from experts in the field that, as drafted, the existing statute substantially limits the use of periodic payments. The statute requires that upon the death of the claimant prior to the end of the time period for periodic payments, the present value of the remaining liability of the defendant must be paid to the claimant's estate. The statute does not indicate what assumptions are to be used in calculating the present value. More importantly, it was claimed that the lump sum refund requirement precludes the writing of standard annuities on the portion of damages subject to this section of the statute. Only fixed period lump-sum refund annuities would be appropriate under these circumstances and apparently they are not widely available in the marketplace.

Another potential problem that was brought to the attention of the Task Force involves Section 768.78(6). It appears that under this section the attorney's lump sum fee is to be calculated upon the basis of total past and future damages without reducing the latter to present value. If this

interpretation is correct, it would likely deter the use of periodic payments in judgments.

Periodic payment of future economic losses offers better long-term financial protection to the injured person than does a lump-sum settlement. Periodic payments also appear to offer cost reductions to insurers with a corresponding potential for savings in liability insurance premiums. At the same time, these savings would not come at the expense of injured persons but are derived from better targeting of compensation to those in need.

As presently written, Section 768.78, subsection (2) of the Tort Reform and Insurance Act of 1986 does not provide optimal conditions for the use of periodic payments, because (1) the $250,000 threshold for invoking periodic payments is too high, and (2) its terms tend to inhibit the use of standard annuities for future economic damages, thereby eliminating the savings potential that would otherwise be available from the use of standard annuities to fund periodic payments.

The Task Force recommends that Florida Statute 768.78 be amended to:

(1) reduce the threshold for periodic payments from $250,000 to $50,000;

(2) permit the use of standard annuities to fund structured settlements; and

(3) provide that plaintiff's attorney's contingent fee be determined based upon the market-determined present value of future periodic payments.

In addition, section 65 of the Tort Reform and Insurance Act of 1986, providing for the "sunset" of F.S. 768.78 in 1990, should be repealed, so that the expected benefits from periodic

payment of future economic losses may be fully realized and continued.

The benefits of periodic payments are sufficiently great to warrant their consideration in small to medium size cases. Reducing the threshold from $250,000 to $50,000 should cause more judgments to include provisions for periodic payments. In addition, the reduced threshold should encourage more parties who settle their cases to consider structured settlements as part of the settlement package. They will have an incentive to do this, because they will be aware that if the case proceeds to trial, the court may require periodic payment of any award of future economic losses over $50,000.

The elimination of the lump sum payment requirement to the estate of the claimant can be expected to increase the use of standard annuities to fund periodic payments in cases which go to judgment. Thus, the same advantages of annuities which are available to claimants who settle would also be potentially available to those cases which go to trial.

Lastly, clarifying the base to which the contingency fee percentage is to be applied will assure that the attorney's fee is tied to the benefits gained for his or her client as measured in today's dollars. In other words, the attorney's fee should be directly related to the value of benefits obtained for a client and these can be properly measured only after they have been reduced to present value.

7. Indexing Statutory Thresholds and Caps

Wherever dollar amounts are used to prescribe statutory thresholds or caps affecting tort remedies, such provisions have the potential to become diluted over time by inflation. The Task Force recommends that provision be made by law to revise all such thresholds and caps periodically by reference to an appropriate index, such as the Consumer Price Index or Gross National Product price deflator.

8. Punitive Damages

As stated in the Final Fact-Finding Report on Insurance and Tort Systems,[68] the underlying Florida case law on punitive damages does not impose any linkage between the amounts of compensatory and punitive damages or any other restrictions on amounts except that the award should be in proportion to the egregiousness of the wrong and should sting but not bankrupt the defendant. The 1986 Act modified this status to limit the punitive award to no more than three times the amount of the compensatory award, with authority to enter judgment on punitive verdicts of greater amounts if the claimant "demonstrates to the court by clear and convincing evidence that the award is not excessive."[69]

The Fact-Finding Report reveals that punitive damage awards "are a comparatively infrequent event," and the size of such awards are "substantially less than might be expected."[70] The Task Force found no compelling evidence that changing the law of punitive damages would make liability insurance more available or more affordable, but it considered a number of alternatives to retaining the 1986 Act for the sake of tort policy

considerations. Among the alternatives reviewed were shifting the burden of persuasion in connection with the three-times limit, repealing the cap, substituting a 75% - 25% split for the 60% - 40% split in the 1986 Act, requiring proof of the liability standard by clear and convincing evidence, and abolishing punitive damages except for intentional torts.

The Task Force concludes that the 1986 Act strikes a rational balance for implementing the policy of punitive damages law and should be given an adequate opportunity to work. Therefore, it is recommended that the sunset provision be repealed.

9. Collateral Source Offsets

Florida statutes have largely replaced the common law "collateral source rule," that denied offset of tort damages for payments received from collateral sources, with a statutory rule that requires offset of most benefits received from collateral sources.[71] No data available to the Task Force provides a compelling reason to recommend a departure from the policy choices recently made by the legislature in these statutes.[72] Nevertheless, the structure of the statutes raises these two specific issues:

1. The statutes do not permit offset of collateral source payments for which the benefit provider has the right of subrogation[73] and,
2. The general collateral source offset statute[74] requires the trial judge to make the offset; whereas, the motor vehicle offset statute requires the jury to make the offset.[75]

The following paragraphs discuss these matters.

In the absence of data from which to make any quantitative evaluation of the first issue,[76] the Task Force has considered several judgmental factors. First, subrogation by the provider of first-party benefits (e.g., hospital insurance) presumably keeps down the cost of such insurance to consumers. Extending the collateral source offset so as to eliminate subrogation might reduce the cost of liability insurance, but it would also increase the cost of first-party insurance. Therefore, there would be no net saving to consumers of all insurance (first-party plus third-party), except to the extent of eliminating transaction costs incurred in obtaining subrogation. Although the Task Force has no data to estimate these costs, informed judgment suggests that they would be a miniscule portion of the combined costs of the entire insurance system, in large part because the right of subrogation is perfected only after all the relatively massive costs of establishing third party liability have accrued.

A second factor is the extent to which existing subrogation rights are satisfied. If through ignorance of the third party actions or otherwise, first party insurers do not uniformly exercise subrogation rights in actions in which a tort recovery is obtained, then the plaintiffs in those instances receive a windfall in the amount of the unexercised subrogation entitlement. Again the Task Force has no data from which to estimate how frequently this occurs and at what overall cost to the system. Nevertheless, whatever these extra costs may be, they are borne by the first-party and not the liability (third-party)

insurance system. For this reason, in the absence of the support, or at least acquiescence, of the first-party insurance industry whose direct economic interests are at stake, a proposal to eliminate the subrogation right (which would be the effect of requiring the offset even when subrogation rights exist[77]) should not be recommended.

Finally, the value of subrogation is that it permits proper reassignment of costs between payors of first-party insurance and payors of third-party insurance. Because proper allocation of responsibility for the consequences of wrongful acts is a proper function of law, this reassignment may achieve desirable public policy goals.

For those reasons, the Task Force does not recommend the extension of the collateral source offset to require offsets in all cases, including those in which there is a subrogation right.

The second issue is whether the collateral source offset calculation provided by Florida law should be performed by the judge or by the jury. The Task Force has no empirical data to establish which method (judge offset versus jury offset) has the greater influence in holding down the cost of liability insurance and self-insurance. The lawyer respondents to a survey question as to the relative effects of the two approaches gave mixed responses: slightly less than half (48%) of the total thought it made no difference. Forty percent of defendants' lawyers thought that having juries make the offset would reduce costs while 38 percent thought that having judges make the offset would reduce costs. Among plaintiffs' lawyers, four times as many attorneys

(25%) thought having judges make the offset would reduce costs more than thought otherwise (6%).

A non-economic factor favoring a uniform procedure in which judges make the offsets is that it would reduce the amount of jury instructions and the concomitant chance of confusion and mistake. It would also be in line with the current practice of requiring special verdicts in comparative negligence cases. On the other hand, having both procedures in operation provides the opportunity for a comparative study to determine which method is better.

The Task Force has not undertaken a comprehensive study of automobile liability insurance problems and, therefore, is reluctant to recommend changing the provision of the automobile liability law that provides for jury offset of collateral source benefits. In the absence of evidence of clear economic consequences, the Task Force does not recommend changing the general liability law that now provides for judge offset of collateral source payments.

10. Itemized Verdicts

The 1986 Tort Reform and Insurance Act requires that finders of fact itemize verdicts into three categories:

(a) economic losses,

(b) non-economic losses,

(c) punitive damages,

and to subitemize categories (a) and (b) between accrued losses at the time of the verdict and those to accrue in the future.[78] These provisions are necessary to implement the 1986 structured

awards[79] and the 1986 several (proportionate) liability statutes.[80]

As described below, the Task Force recommends a substantial extention of the itemized verdict approach which requires juries to articulate their findings as to specific categories of damages. Although attempts to limit non-economic damages have been well publicized, the Task Force believes that excessive jury determinations of economic damage awards may be a larger factor in large jury verdicts. The recommendations described here do not limit awards of economic damages, but prescribe procedures to facilitate the accurate determination of economic damages.

a. Extended Itemized Verdicts.

The process of properly determining streams of future economic losses (both medical expenses and income losses) and then properly reducing the streams to present value puts a very heavy burden on juries. To ease the burden and assure that this process conforms with the underlying tenets of substantive law, the Task Force recommends that juries be instructed to return itemized verdict forms with findings made of the future economic losses specified for each category for each future year in which the jury finds losses will occur.

The jury will not reduce these streams to present values. Instead, the statute should be amended to provide that after the verdict the parties will determine competitive market prices for annuities to fund the combined stream. (The advantages of paying future economic losses by annuity are explained in section I. B. 6. of this report.) In the event that the parties cannot agree upon the proper market price, the trial judge would decide

between the two figures presented by the parties. The court would not select the higher price in the absence of evidence that the security of the future payments is substantially better with the higher priced product. This selection would be subject to judicial review under the standard that it must be supported by the greater weight of the evidence. The figure accepted by the trial judge should be added to the other verdicts (i.e. non-economic damages, accrued economic damages) and judgment should be entered in the aggregated amount.

b. Standardized Discount Rate.

In the event the above recommendation for extended itemized verdicts is not adopted, the Task Force recommends that a standardized discount rate based upon market factors be employed uniformly throughout the state.

The statute (or rule) to implement this recommendation should prescribe a process for determining the correct current discount rate based upon specific published market rate indicators. One approach would have the State Court Administrator's Office determine the discount rate from specified market indicators and adjust the rate monthly or quarterly. Another approach would have the parties present the published market rate indicator data to the judge and have the judge determine the appropriate discount rate by applying the statutory rules to the data.

c. Compilation of Itemized Verdicts.

The Task Force recommends that the itemized verdict statute be amended (or a rule adopted) to require that all itemized

verdicts returned by juries be compiled in a central record office for a period of not less than five years from the date of amendment. Although the Task Force is sensitive to the need of courts and court administrators not to be diverted unnecessarily from their central job of seeing to the administration of justice, the Task Force also believes that progress toward achieving the justice and economic goals underlying the entire effort of the Task Force cannot be properly evaluated in the absence of reliable data as to what actually goes on in the system. One of the greatest impediments faced by the Task Force in the current study has been the inability to obtain reliable data breaking down damage awards and settlements into constituent components. Having the itemized verdict forms available for examination in future research efforts could greatly improve their quality.

11. Jury Instructions on Non-Economic Damages

Nothing is more firmly established in principle and more rigorously adhered to in rhetoric than that the role of judges is to decide questions of law and that the role of juries is to decide questions of fact. Furthermore, it is settled that the measurement of the amount of damages is a question of fact. Accordingly, courts in Florida as elsewhere are loathe to upset jury verdicts as to the amount of damages. Nevertheless, in making determinations of damages, as of any other fact, juries are required to follow the law, including rules of measurement, prescribed by the lawmakers, whether they be common law rules as expressed in judicial decisions or legislative rules as expressed in statutes.

Judges employ the law in two basic ways to guide and ultimately restrain juries in the verdicts they return. First, judges instruct juries as to what the law is that must be followed in determining the amount of damages from the evidence. Then, after the verdict is rendered, judges may review the verdicts to assess whether the amounts could be justified under any reasonable interpretation of the evidence as applied to the relevant rules the jury was instructed to employ. If the verdicts are supportable under this test, judgment must be entered in accordance with them, but, if not, various corrective actions may be taken by the judges, such as judgments notwithstanding the verdict in extreme cases, or in less extreme cases, declarations of mistrials or orders of a remittitur or additur in lieu of mistrial.

The Task Force has reviewed the status of Florida law pertaining to remittiturs and additurs[81] and sees no need to change current Florida law on these points.[82]

Of more difficulty is the issue of how juries should be instructed in measuring non-economic damages, especially those to be suffered in the future (i.e. pain and suffering, emotional distress, mental grief, loss of amenities of life, etc.). The courts in Florida and most everywhere else inform juries that no exact means of measurement exists and that the jury members are to use their collective good sense to arrive at verdicts that are fair, not biased, not inflamed by passion or prejudice, and not wholly outside the scope of the evidence. As guidelines, these standards vaguely prescribe what juries are <u>not</u> to do, but give little positive guidance as to what they are to do.

The Task Force believes that more should be done to guide juries, in order to avoid the possibilities of doubling up economic and non-economic awards, of making non-economic awards as punishment in cases where the lawful criteria of punitive damages are not satisfied, and of granting non-economic awards that serve no compensable purpose as to the injured person. As one mode of implementation, the Florida Supreme Court could incorporate such guidelines, where appropriate, in its judicial opinions, or it could refer the matter to the Committee on Standard Jury Instructions to develop proposed instructions incorporating such guidelines.

To assist in this process, the Task Force offers the following statement of basic principles that should be applied in setting non-economic damages. They are as follows:

1. Non-economic damages are an element of compensatory damages. The law has no inherent curative capacity, but can only award damages that provide tangible substitutes of equivalent value to the plaintiff for the non-economic losses suffered. The fact that monetary damages cannot undo the harm to the plaintiff does not justify unlimited jury discretion in fixing the amount of the award.
2. Non-economic damages should not include any additional damages awarded for the purpose of punishing the defendant or to make an example of bad behavior. The sole goal of compensatory damages is to make the plaintiff whole for what has been lost.

3. Non-economic damages must not include sums for lost earnings or medical and rehabilitative expenses. These are considered to be economic losses, and the jury must award them under the economic damages category and must take great care not to compensate the plaintiff a second time for the same losses by adding extra increments to the non-economic damage award for that purpose.

12. Summary of Recommendations on "Sunset" Provisions of the 1986 Act

Section 65(1) of the Tort Reform and Insurance Act of 1986 provides a July 1, 1990, sunset date for the following tort provisions of that Act:

F.S. 768.73	Punitive Damages
F.S. 768.78	Periodic Payment of Future Economic Damages
F.S. 768.80	$450,000 Limitation on Non-Economic Damages
F.S. 768.81	Comparative Negligence and Joint and Several Liability

Recommendations regarding each of these provisions have been discussed under separate headings of this report. For the convenience of the reader, all of the specific "sunset" recommendations are summarized below.

a. Punitive Damages

The "sunset" provision should be repealed, and F.S. 768.73 revising the law of punitive damages, as enacted by the Tort Reform and Insurance Act of 1986, should be allowed to continue beyond July 1, 1990. (See section I.B.8.)

b. Periodic Payment of Future Economic Damages

The "sunset" provision should be repealed and F.S. 768.78 providing for periodic payment of future economic damages in tort

judgments should be allowed to continue beyond July 1, 1990, with amendments as recommended in this report. (See section I.B.6.)

c. $450,000 Limitation on Non-Economic Damages

F.S. 768.80 imposing a $450,000 limitation on non-economic damages in most tort cases, should be repealed or allowed to expire under the "sunset" provision on July 1, 1990. (See section I.B.5.)

d. Comparative Negligence and Joint and Several Liability

The "sunset" provision should be repealed and F.S. 768.81 covering the law of comparative negligence and joint and several liability should be allowed to continue, with amendments as recommended in this report. (See section I.B.1.)

FOOTNOTES
(Section I.B.)

[1]See infra section I.C.

[2]See infra section I.D., notes 1-65 and accompanying text.

[3]These omitted proposals are discussed in the DISCUSSION DRAFT, TORT REFORM ALTERNATIVES (December 16, 1987) at the following pages: statutes of limitations and repose (56-58), liability of corporate officers and directors (58-59), strict liability for abnormally dangerous activities and for keeping wild animals (59-60), "dual capacity" doctrine for workers' injuries (70), remittitur (99), and ad damnum clause in pleadings (99-100).

[4]FINAL FACT-FINDING REPORT ON INSURANCE AND TORT SYSTEMS, (hereinafter FINAL FACT-FINDING REPORT) March 1, 1988, 343-345 (comparative negligence); 358-361 (joint and several liability); and 361 (1986 TRIA).

[5]Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987).

[6]515 So.2d 198, at 202.

[7]515 So.2d 198, at 201, n.5.

[8]Excluding Alabama, Delaware, Maryland, North and South Carolina, Virginia, and also the District of Columbia.

[9]Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Alaska, Arizona, California, Florida, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island and Washington. The remaining 30 states apply some form of modified comparative negligence.

[10]The 49% rule is followed by at least ten states including Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, West Virginia and Wyoming.

[11]The 50% rule is followed by at least 17 states including Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont and Wisconsin.

[12]The slight/gross states are Nebraska, South Dakota and Tennessee.

[13]All modified schemes are statutory except for Tennessee's and West Virginia's which were judicially adopted, whereas only six states employ pure comparative fault statutes (Arizona, Louisiana, Mississippi, New York, Rhode Island and Washington).

[14]These are Alaska, Florida, Iowa, Michigan, Missouri and New Mexico. Illinois judicially adopted a pure comparative negligence rule but it has been supplanted by a 50% rule statute. See Pearson, Apportionment of Losses under Comparative Fault Laws, 40 LA. L. Rev. 343, 350-52.

[15]ILL. CODE CIV. PROC. §2.1107.1 and 2,116 (1986 Supp.)

[16]I COMPARATIVE NEGLIGENCE, MATTHEW-BENDER 2.30[47], (1984). The reasons given were jury confusion and lobbying by insurance companies.

[17]This recommendation refers specifically and only to Fla. Stat §768.81 (1986 Supp.).

[18]Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987), at 5.

[19]515 So.2d at 200, n.4.

[20]This report goes along with popular usage of the term "severa liability" to describe a regimen under which each defendant is liabile for only a proportionate share of the judgment. The word "several" in "joint and several" liability at common law meant something quite different--that each defendant was severally liabile for the entire judgement.

[21]515 So.2d at 200-01.

[22]515 So.2d at 200, n.4.

[23]Alliance of American Insurers, Summary of Tort Legislation Passed in States in 1987, reprinted in MEALEY'S LITIGATION REPORTS, NATIONAL TORT REFORM, Vol. 2, No. 6 at p. 352 (Sept. 16, 1987).

[24]Fla. Stat. §768.81 (1986 Supp.).

[25]AMERICAN BAR ASSOCIATION'S REPORT ON THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEMS (1987).

[26]FINAL FACT-FINDING REPORT, 47-52, 62-64, 83-86, 88, 96-101.

[27]Under the Florida Uniform Commercial Code, a seller's express or implied warranty extends to [the buyer and] "any natural person who is in the family or household of his buyer, who is a guest in his home or who is an employee, servant or agent of his buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by the breach of the warranty." Fla. Stat. §672.318 (1985). Sellers "may not exclude nor limit the operation of this section." Id. A seller under this section would include a retailer or any other person in the chain of commerce who sold the chattel in question to the buyer.

By contrast, under Restatement of Torts (Second) 402A, relied upon by the Florida Supreme Court in the judicial adoption of product strict liability in Florida, a seller, defined as any person who sells and is in the business of seller, is liable to any user or consumer of a dangerous defective product for bodily injury or property damage done them. West v. Caterpillar Tractor, 336 So.2d 80 (Fla. 1976).

[28]The holding of the Supreme Court in adopting product strict liability was limited to manufacturers. Id., at 92. Nevertheless, several district courts of appeal have applied the theory to hold retailers accountable. FINAL FACT-FINDING REPORT, 352. The proposed federal Uniform Product Safety Act of 1987 (H.B. 1115) limits the liability of retailers ("product sellers") to negligence and express warranty actions. H.B. 1115, 204.

[29]Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986) and Fisher v. Shenandoah Gen. Const. Co., 498 So.2d 882 (Fla. 1986).

[30]Fisher v. Shenandoah Gen. Const. Co., 498 So.2d 882, 883 (Fla. 1986).

[31]Id., at 883, 884.

[32]Id., at 883.

[33]Lawton v. Alpine Engineered Products, Inc. 498 So.2d at 880.

[34]Fla. Stat § 440.11(1)(1985).

[35]Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987).

[36]Id,. at 269, 270.

[37]Id., at 270.

[38]Id., at 272 (Overton, Jr., dissenting).

[39]Fla. Stat. § 767.04 (1985).

[40]Id.

[41]Id.

[42]Id.

[43]Porter v. Allstate Insurance Co., 497 So.2d 927 (Fla. App. 5 Dist. 1986). Reed v. Bowen, 512 So.2d 198 (Fla. 1987), held that age is merely one of the factors to be considered by the jury.

[44]Belcher Yacht, Inc., v. Stickney, 450 So.2d 111 (Fla. 1984) (Handler of vicious guard dog negligently permitted dog in his control to bite the plaintiff who was a business invitee on the premises. Because "Bad Dog" sign was posted, plaintiff could not maintain an action in negligence.)

[45]Fla. Stat. §767.04 (1985) may be amended to read, as follows (words to be deleted enclosed in brackets []; words to be added are underlined):

> The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dogs, shall be strictly liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness. . . .
>
> nor shall any such owner be [so] strictly liable if at the time of any such injury he had displayed in a prominent place on his premises or sign easily readable including the words "Bad Dog," but may be liable in negligence to any person lawfully upon the premises.

[46]ACADEMIC TASK FORCE, MEDICAL MALPRACTICE RECOMMENDATIONS 1 (November 6, 1987), hereinafter cited as MEDICAL MALPRACTICE RECOMMENDATIONS.

[47]Id., at 35.

[48]Id., at 1.

[49]Id., at 10.

[50]Id., at 11-12, 21, 24, 26-27.

[51]Id., at 27; and see Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

[52]Using multiple regression analysis of empirical data, Sloan concluded that caps enacted by various state legislatures in the 1970s had no substantial effect upon medical liability insurance premiums during 1974-78. See Sloan, State Responses To The Malpractice Insurance "Crisis" Of The 1970s: An Empirical Assessment 9 J. HEALTH POLITICS, POLICY & L. 629 (1985). This study may not have allowed sufficient time for the effects of reform legislation to be fully registered. Using more recent data from the 1975-84 claims experience of selected medical malpractice insurers, Danzon estimated that the average impact of various statutes capping awards at several different levels had been to reduce average severity per paid claim by 23 percent. See Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 L. & CONTEMP. PROB. 57, 76-77 (1986). Danzon did not attempt to estimate the actual impact on liability insurance costs.

A 1986 study by the General Accounting Office reports that medical liability insurance rates from 1980 to 1986 increased less in California than in Florida and New York. See GAO, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986). Without benefit of multiple regression analysis, the Attorney General's Tort Policy Working Group attributes the difference to California's stronger tort reform measures adopted in 1975, including a $250,000 cap on noneconomic damages. See TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 79, 92-95 (1987).

[53] See text infra this section.

[54] See text infra this section.

[55] See HAMILTON, RABINOWITZ AND ALSCHULER, CLAIM EVALUATION PROJECT: STATE SPECIFIC RESULTS FOR FLORIDA 37-40 (1987). The report cautions against drawing inferences from these specific case situations to estimate the effect or lack of effect on liability insurance costs generally, because the specific cases may not be representative of an insurance company's total book of business in the state.

[56] See PRELIMINARY FACT-FINDING REPORT ON MALPRACTICE, 141.

[57] See FINAL FACT-FINDING REPORT, 94, 96.

[58] Id.

[59] See PRELIMINARY FACT-FINDING REPORT ON MEDICAL MALPRACTICE, 134.

[60] Id., at 135.

[61] See FINAL FACT-FINDING REPORT, 102.

[62] See MEDICAL MALPRACTICE RECOMMENDATIONS, 24, 26-27.

[63] Id., at 16-20.

[64] In the United States, the structured settlements industry began in the 1970's and has grown rapidly since then. Total premium income from structured settlements passed $3 billion in 1985, an increase of $500 million over the previous year.

The Task Force reviewed the liability insurance closed claim data to ascertain the extent to which structured settlements have been used in Florida. Information on medical malpractice liability was available only since 1985, while the other liability lines had information available from 1981 to 1985. Several points should be noted from this analysis. First, structured settlements are used more frequently in medical

malpractice than in other liability lines (approximately 2.5 percent of all cases in medical malpractice versus about 1 percent in the other cases). Second, the proportion of paid claims involving structured settlements relative to all paid claims is higher in medical malpractice (about 20 percent) than in the other lines (5 to 15 percent). Finally, virtually all structured settlements involve the use of annuities.

The purchase of an annuity to fund periodic payments offers tax advantages as well as the ability to consume the principal sum of money and still guarantee that the annuitant will never outlive the income stream. Under the funding arrangements formally used, the defendant insurer purchased an annuity from a life insurer which then made the payments to the claimant. If the life insurer failed and was unable to make its payments, the defendant insurer continued to be liable for all future payments. This situation was altered when Congress passed the Periodic Payment Settlement Act in 1982 (also known as Public Law 97-473). The Act provided that a qualified assignment preserved the tax-free status of the annuity payments in the hands of the claimants. Under a qualified assignment, a third party guarantees the deferred payments to the claimant. The defendant and his or her insurer are thereby relieved of the ultimate liability for making the payments in the event the life insurer becomes insolvent.

Structured settlements are potentially more advantageous in connection with larger claims, especially those cases where collateral sources have been available to cover past medical expenses and the bulk of the settlement amount is therefore available for periodic payment. Historically, the average amount involved in a structured settlement was $150,000. More recently, one major broker reported that more than 35 percent of its structured settlement cases were for $25,000 or less and another 20 percent were between $25,000 and $50,000.

[65]INTERNAL REVENUE CODE § 104(a)(2).

[66]Amounts received under periodic payments are also non-taxable. The significant point, however, is that this exclusion applies to the total amount of the payout during the annuity period. For example, suppose that as part of a settlement package, a 42 year-old claimant was to be paid $1,000 per month for life with a guarantee that payments would be made for 20 years. The entire $1,000 payment would be received tax-free in the hands of the claimant for as long as it was paid. Assuming an average life expectancy of 74 years, the claimant would receive a total tax-free payout of $384,000. The cost of this annuity would be approximately $130,000. If the case had been settled for this amount, $130,000 would have been received tax-free by the claimant and subsequent investment returns may have incurred a tax liability.

[67]This difference is illustrated by the following two examples which were obtained from one of the largest structured settlement companies in the country.

Case 1: An 18 year old male suffered a head injury as a result of an automobile accident. The plaintiff's medical expert stated that the claimant would require a live-in aide but would be able to work at the minimum wage. The table below illustrates the benefits requested for the injured person, their cost as estimated by the plaintiff's expert and the actual market cost of an annuity to provide the requested benefits.

Benefit:	Estimated Cost (Plaintiff Expert)	Market Cost (Life annuity)
1) Income loss	$273,061	$146,460
2) Live-in aide	541,383	219,449

Case 2: It was alleged that an emergency room physician failed to properly diagnose and treat meningitis, thereby causing severe brain damage to a 4 year-old female.

Benefit:	Estimated Cost (Plaintiff Expert)	Market Cost (Life annuity)
1) Cost of care	$5,388,620	$1,708,232
2) Income loss	408,981	129,356

It would be incorrect to assume that the entire difference between the figures presented represent the potential savings from the use of structured settlements. In each of the above cases, the defendant's insurer would have made an independent (and lower) estimate of the present value cost, perhaps leading to a negotiated figure somewhere between the two estimates. Even so, ample room remains for cost savings through the structured settlement.

[68]FINAL FACT-FINDING REPORT, 341-342.

[69]Fla. Stat. §768.73(1)(b) (1986 Supp.)

[70]FINAL FACT-FINDING REPORT, 256-57.

[71]See, FINAL FACT-FINDING REPORT, 339-340.

[72]The Task Force notes that a majority of a sample of plaintiffs' lawyers neither believed the offsets to be likely to reduce insurance costs enough to make an economic difference nor believed them justified on any basis. Nevertheless, aggregated opinion and judgment on the other side at least balances this view. See section I. A. 2. of this report.

[73]Fla. Stat. §68.76(1), the general offset statute, specifically states this rule, and, although Fla. Stat. §627.7372 (1986 Supp.), the motor vehicle offset statute, does not state the rule specifically, the Florida Supreme Court has held that the statute does not preclude a first party provider from obtaining subrogation from a third party liability insurer. Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421 (Fla. 1986).

[74]Fla. Stat. § 768.76(1).

[75]Fla. Stat. § 627.737(1).

[76]The Task Force notes that the Florida Insurance Commissioner estimated cost savings of 10.8% for adopting his proposals as to subrogable collateral source payments in malpractice claims. The Research Staff has not been able to evaluate the assumptions on which this estimate was based. Because malpractice awards are on the average much higher than other tort awards, one may infer that the effect on all claims would be substantially less than whatever proved true for malpractice claims.

[77]The Task Force notes that impairment of contract issues would be raised by a collateral offset statute that defeated subrogation rights in pre-statute insurance contracts. Post-statute contracts, however, would be controlled by the statute. But see, Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 498 So.2d 421 (Fla. 1986).

[78]Fla. Stat. § 768.77 (1986 Supp.).

[79]Fla. Stat. § 768.78 (1986 Supp.).

[80]Fla. Stat. § 768.81. One element of this statute continues joint and several liability as to economic damages as to a tortfeasor whose allocated percentage of negligence equalled or exceeded that of the plaintiff. Fla. Stat. §768.81(3)(1986 Supp.).

[81]DISCUSSION DRAFT, TORT REFORM ALTERNATIVES, 99 (Dec. 16, 1987)

[82]See FINAL FACT-FINDING REPORT, 385-386.

C. Alternative Compensation Systems

The Task Force has considered alternatives to the tort and liability insurance systems in three categories: (1) alternatives that would use a compulsory "no-fault" insurance principle; (2) "neo no-fault" alternatives; and (3) alternatives that would use a social welfare legislation principle. For reasons explained below, the Task Force has not recommended adoption of these alternatives.

1. Compulsory No-Fault Insurance

Automobile no-fault laws and worker's compensation laws are examples of alternatives that use a compulsory no-fault insurance principle. Both examples replace tort liability, in part or completely, with mandatory insurance payments to cover basic economic losses resulting from accidental injury, without regard to fault. The two examples differ, however, in the means by which insurance is provided.

Automobile no-fault laws require motorists to have first-party casualty insurance to protect themselves against basic economic losses resulting from accidental injuries below defined thresholds.[1] Worker's compensation laws, on the other hand, use third-party insurance provided by employers to cover employees' basic economic losses resulting from employment injuries.[2]

The mandatory first-party insurance approach depends upon two basic conditions for its successful application in automobile no-fault laws. The first condition is a pool of insured persons who share reciprocal interests. Every motorist is both a potential tort claimant and tortfeasor with roughly comparable interests in receiving compensation for basic economic losses and

for avoiding the costs of tort liability resulting from automobile accidents. These reciprocal interests provide the basis for the trade-off of partial tort immunity for mandatory first-party insurance. The second condition is the existence of an easily controlled point of entry into the injury-producing activity, so that the requirement of compulsory first-party insurance can be effectively enforced. As a condition of licensing his motor vehicle, every motorist can be required to show that he has the prescribed no-fault insurance coverage.

These two basic conditions for a mandatory first-party insurance alternative cannot be satisfied in most areas of tort liability. For example, in the areas of products liability and professional liability, relatively few persons are both potential victims and potential tortfeasors, and it would be very difficult to enforce a requirement of first-party accident insurance as a condition for becoming a consumer of manufactured products or professional services. The area of premises liability might be a potential candidate, but only in a simple rural society where every potential victim and every potential tortfeasor was also an owner or occupier of premises involving roughly comparable propensity to cause harm.

In the absence of the basic conditions for mandatory first-party insurance, it becomes necessary to consider mandatory third-party insurance alternatives, using the worker's compensation analogy. Here the necessary conditions include, first, an enterprise capable of self-insuring or spreading the mandatory insurance costs broadly through the price of goods and

services, and, second, workable limitations in the definition of the compensable event, without reference to fault.

Persons and enterprises that manufacture or sell products and provide services may meet the first condition, but the problem of defining the compensable event must still be confronted before extending the third-party insurance principle to fields beyond workers' compensation. Workers' compensation laws define the compensable event in terms of work-related injuries, and this has proved workable, both administratively and financially. That is, the compensable event can be determined with relative ease and precision, as a matter of administration, and the resulting coverage has not imposed greater costs than employers generally could bear.

However, when others have attempted to apply the mandatory no-fault insurance principle to medical injuries, problems with defining the compensable event have been encountered, because it is difficult to define medical injuries without reference to substandard professional conduct.[3] Yet without some such limitation, no-fault insurance for medical injuries has a potential to expand into general health care insurance at prohibitive costs. Empirical studies have shown that the actual incidence of medical injuries greatly exceeds the number of paid claims under the tort system, so that the potential increased frequency of claims under a no-fault system would probably overwhelm any savings realized from reduced damage payments under a no-fault insurance scheme.[4] In view of these facts, the Task Force decided not to recommend a no-fault insurance plan for medical injuries, except for catastrophic birth-related

neurological injuries. That exception was based upon a strictly limited definition of the compensable event, combined with an especially urgent need for relief in the costs of liability insurance for physicians practicing obstetrics.[5]

The expansive potential for increased frequency of claims hangs heavily over any proposal for extending no-fault insurance into other fields of tort liability.[6] Except in the areas of automobile and medical injuries, comprehensive studies have not been available in this country to estimate the ratio of compensated claims to accidental injuries in various fields. A recent comprehensive study in England showed that, for all types of accidental injury other than road accidents and work accidents, fewer than one in fifty accident victims obtained damages.[7] If American experience is even roughly comparable, the potential for increased frequency of claims under any general no-fault system could easily overwhelm possible savings attributable to limited damages and reduced litigation costs.

2. "Neo No-Fault"

Recognizing these difficulties in extending compulsory no-fault insurance to other fields of tort liability,[8] Professor Jeffrey O'Connell has developed an alternative approach called "neo no-fault" to facilitate disposition of many claims for products injuries and medical injuries without having to determine fault. Legislation would authorize defendants or their insurers to extinguish such claims by a non-refusable offer to pay a claimant's net economic losses plus attorney fees.[9]

The principal criticism of the "neo no-fault" proposal is that its one-sided option to extinguish tort liability may be

unfair to some claimants. But if claimants were permitted to refuse the offer, it would become nothing more than the opening gambit in settlement negotiations, and insurers would be unlikely to make such offers, because they would be contrued as an admission of weakness. On the other hand, claimants cannot be empowered to make non-refusable demands for payment of net economic loss in satisfaction of their claims, because that would expose liability insurers to the expansive potential of having to pay net economic losses for all accidental injuries, regardless of fault.

For these reasons, the Task Force does not recommend adoption of a "neo no-fault" plan.

3. Social Welfare Legislation

Compulsory no-fault and "neo no-fault" insurance alternatives attempt to charge the costs of accidental injuries to the particular activity or enterprise that produced the injuries. While insurance is then used to redistribute the costs broadly among those engaged in similar activities or enterprises, it is still a private financing mechanism, prescribed by public law, to cover the costs of accidental injuries.

An alternative approach would be to provide compensation for accidental injuries through social welfare payments from the public treasury.[10] To some extent Social Security, Medicare, Medicaid, and other public assistance programs now provide some support for persons who are incapacitated by accidental injury, but this has not been done for the express purpose of providing an alternative to the tort and liability insurance systems.

The Task Force has not systematically evaluated proposal for further extension of the social welfare principle to provid more or less comprehensive alternatives to the tort and liabilit insurance systems. While some language in the Act creating th Task Force might be cited as providing implied authority for broader inquiry,[11] the legislation is primarily directed towar investigation and reform within the scope of the existing tor and liability insurance systems.[12] That has also been the focu of the Task Force's efforts. Therefore, this report will b limited to a few general observations regarding social welfar legislation alternatives.

New Zealand's Accident Compensation Act offers the clearest illustration of social welfare legislation replacing the commor law of torts with insured payments from a state administered fund to cover basic economic losses resulting from accidental injuries regardless of fault.[13] The plan is financed by a flat tax levied upon motorists and employers. While there have been some problems, the plan is apparently working to the satisfaction of most New Zealanders.[14] However, any state legislature considering adoption of such a plan must confront several fundamental policy questions.

The first question concerns the justification, under social welfare logic, for providing assured compensation to the victims of accidental injuries and not extending similar benefits to the victims of other misfortunes, such as illness, congenital disabilities, desertion, and natural disasters. Research shows that these other misfortunes cause far greater losses to more people than accidental injuries.[15] The second question concerns

the basic equity of placing the burden for financing these social welfare benefits upon employers and motorists rather than upon the entire population or the general economy.

Moreover, implementation of such legislation in a single state of the federal union would raise further questions as to whether the tax burden would impose competitive disadvantages on businesses located within that state but competing for nationwide markets. Such questions may be especially important in a state like Florida, where the population of potential accident victims may be expanding at a faster rate than the state's tax base. These are questions that the Task Force is not prepared to answer, and, therefore, it cannot responsibly recommend adoption of such a comprehensive legislative alternative to the tort and liability insurance systems.

A more gradual approach has been proposed by Professor Stephen Sugarman of the faculty of the University of California at Berkeley Law School, who addressed the Task Force at its October 1986 meeting in Tampa. Professor Sugarman proposes that tort law should be ultimately retired in favor of private and governmental programs to assure provision of medical care and income maintenance for all victims of disability, supplemented by private insurance. Recognizing that instantaneous transition might be impractical, he recommends, as interim measures, the adoption by state legislatures of statutes requiring employers to provide sick leave for up to six months for disability from both work and non-work related causes, expansion of worker's compensation to cover both work and non-work related injuries for

long-term earnings protection, and adoption of more effective no fault automobile accident plans. He would integrate all thes programs with Social Security and Medicare, reverse th collateral source rule, eliminate awards for pain and sufferin or at least restrict such awards to no more than $100,000, an limit recovery of punitive damages.[16]

The Task Force has addressed only those parts of thi proposal that concern specific revisions in the measure of tor damages. It has not evaluated the broader implications of stat legislation to provide sick leave and expand worker's compensation, and the integration of these proposed measures wit Social Security and Medicare. Eventually the implementation of such proposals would lead to the policy questions associated with comprehensive social welfare legislation, and, for reasons suggested above, the Task Force is not prepared to answer these questions.

FOOTNOTES
(Section I.C.)

[1]See W. PROSSER & P. KEETON, THE LAW OF TORTS 606-08 (5th ed. 1984) (hereinafter cited as PROSSER).

[2]See PROSSER, supra note 1, at 568,572-74.

[3]See J. O'CONNELL & C. KELLY, THE BLAME GAME 128-29 (1987)(hereinafter cited as O'CONNELL); P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 214-217 (1985).

[5]See DANZON, supra note 3; CALIFORNIA MEDICAL ASSOCIATION & CALIFORNIA HOSPITAL ASSOCIATION, REPORT ON THE MEDICAL INSURANCE FEASIBILITY STUDY (1977); Mills, Medical Insurance Feasibility Study: A Technical Summary, 128 WEST. J. MED. 360-65 (1978).

[6]MEDICAL MALPRACTICE RECOMMENDATIONS 30-34 (November 6, 1987).

[7]See O'CONNELL, supra note 3, at 128-29.

[8]D. HARRIS et al., COMPENSATION AND SUMMPORT OF ILLNESS AND INJURY 317 (1984); and see Pedrick, Perspectives on Personal Injury Law, 26 WASHBURN L. J. 399, 405 (1987).

[9]See O'CONNELL, supra note 3, at 128-29.

[10]Id. at 130-139.

[12]See PROSSER, supra note 1, at 612.

[13]See Tort Reform and Insurance Act of 1986, section 63(5)(g,h).

[14]Id. at section 63(5)(a-n).

[15]The Accident Compensation Act of 1972, 1 N.Z. STAT. 521 (1972) implemented the WOODHOUSE REPORT, REPORT OF THE ROYAL COMMISSION OF INQUIRY; COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967). For a description of the Act, see Palmer, Compensation for Personal Injury: A Requiem for the Common Law in New Zealand, 21 AM. J. COMP. L. 1 (1973).

[16]Id., see also Harris, Accident Compensation in New Zealand: A Comprehensive Insurance System, 37 MOD. L. REV. 361 (1974); G. PALMER, COMPENSATION FOR INCAPACITY 405-06 (1979); T. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE THE NEW ZEALAND SCHEME (1980); Brown, Deterrents in Tort and No-Fault: The New Zealand Experience, 73 CALIF. L. REV. 976 (1985).

[17]See D. Harris, supra note 8, at 325-27; Pedrick, Perspectives on Personal Injury Law, 26 WASHBURN L. J. 399, 400, 402-406 (1987).

[18] See Sugarman, Doing Away With Tort Law, 73 CALIF. L. REV. 55 (1985); and Sugarman, Serious Tort Reform, 24 SAN DIEGO I REV. 759 (1987); but cf. Little, Up With Torts, 24 SA DIEGO L. REV. 861 (1987).

D. Process Reform

The reform alternatives described in this section address the processes of the civil justice system and not substantive tort doctrines affecting either liability or damages.

1. Limitations on Frivolous Claims and Defenses

The Final Fact-Finding Report on Insurance and Tort Systems suggested that although proponents of civil justice reform identify "frivolous lawsuits" as a key problem in the legal system, the problem is a difficult one to quantify.[1] The report concluded that "there are some frivolous claims, but clearly less than 25 percent of all claims and possibly less than ten percent of all claims."[2] Nonetheless, it asserted that the elimination of frivolous claims "would significantly reduce legal defense costs and the total amount spent to pay claims without reducing recoveries of deserving claimants on meritorious claims."[3]

In Florida, sanctions for frivolous complaints and defenses are governed by Florida Statute 57.105. As amended by the Tort Reform and Insurance Act of 1986, this statute provides:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client.

As noted in the Final Fact-Finding Report on the Insurance and Tort Systems, the Florida standard is a subjective one, requiring both bad faith and a "complete absence of justiciable issue" and not requiring a "reasonable inquiry" into facts or

law. The Florida Supreme Court has analogized the "complete absence of justiciable issue" standard to an earlier court definition of "frivolous."[4]

The Task Force considered a variety of approaches for dealing with frivolous claims and defenses including retaining current Florida law, enactment of the standard contained in Federal Rule of Civil Procedure 11, and adoption of provisions allowing a party to counterclaim when he believes that the other party has asserted a frivolous claim or defense.

The Task Force recommends that Florida adopt provisions providing sanctions for frivolous claims and defenses similar to those contained in Federal Rule 11.

The relevant portions of Rule 11 of the Federal Rules of Civil Procedure, as amended in 1983 after considerable study, read as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (emphasis added)

The differences between the current Florida rule and the federal rule are significant. First, unlike the Florida rule and the Federal Rule 11 as it existed prior to the 1983 amendments,

the current Rule 11 creates an affirmative duty on an attorney before he files a claim or defense. He must demonstrate that his conduct was reasonable and justified under the circumstances of the time; the "pure heart, empty head" excuse, all that usually is required under a "good faith" standard, is not sufficient. The affirmative duty to investigate is specified to include that the pleading is (1) grounded in fact, (2) warranted by law, and (3) not filed for an improper purpose. These standards are considerably more demanding than the Florida standard of a "complete lack of justiciable issue."

Not all sanctions under Federal Rule 11 result in a written and published court opinion. Nonetheless, a comparison of the number of reported cases involving Federal Rule 11 prior to the 1983 amendments, when violation required a showing of bad faith similar to the Florida statute, with the number of reported cases following the 1983 amendments, suggests the importance of moving from a "bad faith" standard to a "reasonable" standard in facilitating sanctions. A 1976 law review article indicated that there were only eleven reported cases that resulted in affirmative findings of Rule 11 violations in several decades of experience under Rule 11, and a majority of these did not result in sanctions involving either the granting of attorney's fees or the striking of a pleading.[5] In contrast, in a period of less than two years following the enactment of the 1983 amendments to Federal Rule 11, at least 159 opinions have been published concerning sanctions against counsel under Rule 11, and awards of some portion of attorney's fees have been made in 65 of those cases.[6]

The American Bar Association's Action Commission to Improve the Tort Liability System has recommended the following:

> Standards should be adopted substantially similar to those set forth in Rule 11 of the Federal Rule of Civil Procedure as a means of discouraging dilatory motion practice and frivolous claims and defenses.[7]

The Task Force recommends adoption of standards similar to those contained in Federal Rule 11 to govern frivolous claims and defenses even though it is not possible to evaluate empirically the 1986 changes to Florida Statute 57.105. The past experiences of the federal system and other states provide adequate evidence, in the view of the Task Force, that sanctions for frivolous claims and defenses are likely to be ineffective unless they are triggered by an objective standard such as the "reasonable inquiry" requirement of Federal Rule 11.[8]

2. Limitations on Contingent Fees

The Final Fact-Finding Report on the Insurance and Tort Systems discusses the nature of contingent fee agreements, the amount of plaintiff's attorneys fees, the justifications and criticisms of the existing plaintiff contingent fee structure and the current state of regulation of contingent fee agreements in the state of Florida.[9] That discussion will not be repeated here.

The Task Force considered seven alternative approaches for addressing the issue of attorneys' fees for plaintiffs. These possible approaches included:

1. Continuation of existing limitations on contingent fees;
2. Abolition of all limitations on contingent fees;[10]

3. More stringent limitations on contingent fees such as the California rules governing medical malpractice actions;

4. Provision requiring losing party to reimburse prevailing party for reasonable attorney's fees as determined under "lodestar" approach;[11]

5. Requirement that trial court carefully scrutinize plaintiff's attorney's fees in all cases and that such awards be determined under a "lodestar" reasonable fee approach rather than on a percentage basis;[12]

6. Prohibition of contingent fees coupled with provision of government tort lawyers for those not able to pay their own attorneys' fees;[13] and

7. More stringent limitations on referral fees.[14]

The Task Force recommends that the existing limitations on contingent fees adopted by the Florida Supreme Court should be continued and that they should not be modified or replaced until they have had a chance to work. Two members of the Task Force, however, dissented on this issue and prefer more stringent limitations on contingent fees. Reasons for both the majority and the minority view will be presented in the following paragraphs.

As described in the Final Fact-Finding Report on Insurance and Tort Systems,[15] the Florida Supreme Court has regulated the amount of contingent fees charged since July 1, 1986. The process of entering into a contingent fee contract also is regulated. The Supreme Court has forbidden any "clearly excessive fee" and provided that:

(1) Without prior court approval as specified below, any contingent fee which exceeds the following standards shall be clearly excessive:

(a) 33 1/3% of any recovery up to $1 million through the time of filing of an answer or the demand for appointment of arbitrators;

(b) 40% of any recovery up to $1 million through th trial of the case;

(c) 30% of any recovery up to $1-2 million;

(d) 20% of any recovery in excess of $2 million;

(e) If all defendants admit liability at the time o: filing their answers and request a trial only o: damages:

(i) 33 1/3% of any recovery up to $1 millio: from the defendant through trial;

(ii) 20% of any recovery between $1 and $: million;

(iii) 15% of any recovery in excess of $: million;

(f) An additional 5% of any recovery after notice o: appeal is filed or post-judgment relief or actio: is required for recovery on the judgment.

The existing Florida regulation of the process of enterir into contingent fee agreements and the Florida prohibition c agreements which are "clearly excessive" are in accord with th recommendations of the American Bar Association's Report of th Action Commission to Improve the Tort Liability System.[16]

A majority of the Task Force concludes that the Supreme Court rules regarding contingent fees are appropriate and should not be modified or replaced at this time. These guidelines prevent aberrantly excessive fees. The guidelines have been in effect less than two years, and therefore any cost reductions which may result from the guidelines have not yet been reflected in reduced loss payments. The Florida Supreme Court adopted these guidelines after considerable study of attorney's fees, and the Supreme Court is the most qualified and most appropriate branch of the government to regulate attorney's fees.

Two members of the Task Force dissent from this recommendation and prefer more stringent limits on contingent fees, such as those in effect in medical malpractice cases in California. In medical malpractice cases in California, the plaintiff attorney's contingent fee is limited to:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000).

(3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars.[17]

These two members of the Task Force believe that the California limits would lower the total amounts of loss payments, without impairing the ability of Florida residents to obtain high quality legal services.[18] In an attempt to quantify the effects of the California law, these limits on contingent fees were applied to Florida medical malpractice payments during 1985 and 1986. It was assumed that under current Florida practice, the contingent fee was 33 1/3 percent in all cases, which according to the Survey of Florida Tort Lawyers, probably underestimates current fees. In Florida medical malpractice cases alone, the California limits would result in an average annual savings of $13,446,840. This represents a reduction in the percentage of total medical malpractice claims payments attributable to plaintiffs' attorneys' fees from 33.3 percent of the amount spent on medical malpractice claims to 23.0 percent of total claims payments. The percentage reduction in other types of cases

cannot be determined from reliable data accessible to the Tas Force, but is undoubtedly smaller because the size of clai payments are substantially smaller and the limits on continger fees have the greatest effect on fees in larger cases.

Existing Florida data do not allow the Task Force t determine exactly what effect more stringent contingent fe arrangements would have on claim frequency and claim severity Logically, because claimants receive a higher portion of th total payment when contingent fees are more limited, they shoul be willing to settle for less. A computer model of the medica malpractice bargaining process conducted by Dr. Patricia Danzo for the Rand Corporation showed that the aggregate effects of al the limits on contingent fees enacted in various jurisdiction during the time period 1974 through 1976 was to reduce th severity of claims payments by 9 percent. It also follow logically that more strict contingent fees for the larges portion of award payments would decrease slightly the frequenc of filing of claims with questionable liability and high expecte damages.

Two members of the Task Force, therefore, dissent from th Task Force recommendation on contingent fees and recommen adoption of the limitations on contingent fees which currentl are in effect in California in medical malpractice cases.

3. Reducing Delay and Litigation Costs

The Final Fact-Finding Report on Insurance and Tort System discusses the problems of delay and litigation costs in Florid tort cases.[19] The Report finds that problems of delay are not a severe in Florida as in many other places.[20] Nevertheless, it

appears that unnecessary delay may occur in more than twenty-five percent of the cases.[21]

Increased nationwide concern over the problems of delay has produced a growing literature, including a number of recent empirical studies.[22] These studies suggest three basic approaches to reducing delay in civil litigation: (1) procedural reform, to simplify the process or eliminate abuses of existing rules; (2) improved case management and better judicial administration; and (3) incentives for prompt resolution of cases (or disincentives for delay). The literature devotes more attention to the first two approaches and emphasizes the need for both. Empirical studies indicate that procedural reform without improved case management may accomplish very little.[23] Because the Task Force has not undertaken evaluation of proposals in the technical area of case management, it would be of questionable value to consider extensive possibilities for procedural reform. Consideration of proposals for procedural reform will be limited to the areas of pretrial discovery and summary judgment, discussed in the next two subsections of this report. The question of incentives will then be considered in the third subsection.

a. Limitations On Discovery

The Final Fact-Finding Report on Insurance and Tort Systems describes the function of pretrial discovery procedures and reviews facts regarding the potential abuse of these procedures to cause unnecessary delay and expense in Florida tort cases.[24] This section will discuss reform recommendations, in the light of the findings of fact previously reported.

The Task Force's research findings provide some basis fo concern about excessive use and even abuse of discover procedures.[25] The results of the Survey of Florida Tort Lawyer suggested more extensive use of discovery than has been reporte elsewhere.[26] More than half of the lawyers responding to th survey, including lawyers for both sides, believed that opposin counsel engaged in excessive discovery in 25 percent of th cases,[27] and a near-majority of plaintiff's lawyers believed tha defense counsel had used discovery for delay or harassment i about 10 percent of the cases.[28] 64.4 percent of plaintiff' lawyers and 42.6 percent of the defense lawyers believed tha trial court supervision of discovery should be more stringent.[29]

(1) General Scope of Reform Alternatives

Nationwide concern over abuse of discovery procedures ha produced a surge of recent writing, including both scholarl commentary and some empirical research.[30] Nevertheless, "there is no outcry in the literature for wholesale abandonment of the scheme of the current discovery rules. While many of the reform proposed are clearly more than trivial, they are not massive o comprehensive in scale; they do not challenge the fundamental notion that providing for relatively liberal discovery tends to further rather than impede the goal of an effective system of justice."[31]

Most of the proposed reforms are aimed at "fine tuning" the scope of discovery, adding some specific structural or procedural restraints on particular discovery devices, and increasing the level of judicial supervision of the discovery process.[32] The

Task Force's research efforts, including the particular Florida data cited above, do not suggest the need for more sweeping or radical reform. Because discovery is a matter of procedure within the Florida Supreme Court's constitutional rule-making authority,[33] recommendations for reform in this area are addressed to the Court or its advisory committees rather than to the legislature.

(2) Recommendations Based on Recent Amendments to Federal Discovery Rules

The Task Force recommends that the Florida Supreme Court consider three amendments that were recently adopted to the Federal Rules to provide better control of the discovery process.[34] Similar amendments have not been adopted in Florida.

1. Discovery Conference. A 1980 amendment to the Federal Rules provides for a discovery conference, which an attorney may request if he cannot work out a reasonable program of discovery with opposing counsel. These discovery conferences are not to be held routinely, but only when necessary for the court to help establish a discovery plan because of the parties' inability to do so.[35]

2. Certification Requirement. A 1983 amendment added a certification requirement, so that federal discovery requests and responses now must be signed by the attorney, attesting to his belief, after reasonable inquiry, that they are properly made, not interposed to cause unnecessary delay or expense, and not unreasonably burdensome or expensive, given the needs of the case. The court is authorized to impose sanctions, if a certification is made in violation of the rule.[36]

3. Limiting Excessive Discovery. Another 1983 amendment to the Federal Rules gives the court specific authority to limit discovery of material otherwise appropriate for discovery, if it appears to be unreasonably duplicative or oppressive or disproportionate to the needs of the case.[37]

These amendments address points of concern that have been identified by the Task Force, and they deserve careful consideration by virtue of their approval by the United States Judicial Conference and the Supreme Court. However, we are not aware of any study that has measured their actual effect in federal practice.

The Task Force has considered, but does not recommend adoption of, several additional proposals, including further limits on the number of interrogatories, restricting the scope of discovery, imposing time limits on discovery, eliminating discovery in smaller cases, and reallocation of the costs of discovery.[38]

b. Liberalizing The Use Of Summary Judgment

Summary judgment procedure provides a tool to dispose of some nonmeritorious claims or defenses before incurring the expense and inconvenience of trial. A claim or defense that is legally sufficient in the pleadings may sometimes lack necessary factual support; it could never be proved at trial. If the party moving for summary judgment can show that in reality there is no genuine dispute as to any material fact and that he is legally entitled to prevail on the undisputed facts, the court must immediately dispose of the sham claim or defense.[39]

Florida has the same basic rules for summary judgment procedure[40] as most other states, based upon the Federal Rules of Civil Procedure.[41] Since these rules fall within the judiciary's constitutional authority to regulate procedure,[42] proposals for change should be addressed to the Florida Supreme Court or its advisory committees rather than to the legislature.

There are constitutional limits on the standard for granting summary judgment, because the opposing party's right to a jury trial of disputed factual issues must not be infringed.[43] Therefore, the basic conceptual standard cannot be expanded beyond the present rule, which requires a showing "that there is no genuine issue as to any material fact."[44] Courts may be more or less liberal in how that standard is interpreted or applied in particular cases, but that is not a matter easily regulated by rule or by statute.

Moreover, summary judgment procedure has less potential for liberal application in tort cases than in some other areas of civil litigation. It is generally inappropriate to grant summary judgment when the standard of liability is based upon negligence or other fault concepts that depend upon an evaluative inference or conclusion.[45] Even in those few cases where the underlying facts may be undisputed, the inference or conclusion of fault is normally treated as a fact issue for the jury, unless there is no room for reasonable minds to differ. A motion for summary judgment still has some potential to provide appropriate relief in tort cases, when undisputed facts will show that a particular plaintiff suffered no injury or loss, or that a particular

defendant had no factual connection with the injury or fit within a class of persons entitled to legal immunity.[46]

A recent trilogy of opinions by the United States Supreme Court[47] reaffirms the value of summary judgment to dispose of nonmeritorious claims and should provide encouragement for lower federal courts to use the process more confidently, even in tort cases.[48] The Florida Supreme Court could provide similar leadership for the Florida courts, both by appropriate admonitions in its opinions, and by adopting the rule amendment discussed in the following paragraph.

Florida courts have apparently experienced some difficulty with one question of summary judgment practice that could be addressed by a rule amendment similar to that adopted for federal practice in 1963. When the party moving for summary judgment makes a sufficient showing that there is no factual support for some necessary element of the challenged claim or defense, may the opposing party rely upon the general allegations of his pleading to establish the existence of a disputed "issue," or must he make some specific showing that he has evidence to support his pleading in order to avoid summary judgment? Florida decisions have suggested apparently inconsistent answers.[49]

A similar conflict among federal courts was addressed by the 1963 amendment which added the following provision to Federal Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If

the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[50]

The Task Force recommends that the Florida Supreme Court consider adoption of a similar amendment to Florida's Rule 1.510(e) in order to promote more effective use of summary judgment to eliminate nonmeritorious claims and defenses before trial.[51]

c. Incentives for Prompt Resolution of Cases

The failure of lawyers and insurance companies to realistically evaluate their claims and defenses at an early stage has been repeatedly identified as a major cause for delay in disposing of frivolous claims and for failure to achieve prompt settlement of meritorious claims.

The Task Force recommends that the Legislature adopt the procedure outlined below, designated the "Mandated Demand for Judgment Plan." This plan requires the parties to make serious offers to settle cases early in litigation and provides interest penalties for failing to make realistic offers or for failing to accept reasonable offers. This should motivate early and thorough consideration of the strengths and weaknesses of claims by both sides, encourage early settlement, obtain quicker recovery for deserving claimants and reduce litigation costs and fees.

The "Mandated Demand for Judgment Plan" builds on Florida's existing Demand for Judgment/Offer of Judgment Procedures and would require the following procedures:

1. After filing suit, the plaintiff must make a demand for judgment against each defendant within ninety (90) days of the date the action began.

(a) The demand must be filed with the court and become a part of the record of the suit.

(b) If the plaintiff does not file the demand, the defendant may file a motion to dismiss and the action shall be dismissed with a right of the plaintiff to replead if and only if the action is not otherwise banned by operation of law.

2. If the demand is not accepted and the litigation continues to the point that the plaintiff has obtained a final and binding judgment; and,

(a) If the amount of the judgment exceeds the amount of the plaintiff's unaccepted demand, the defendant shall be required to pay the judgment plus interest computed at the rate of 18% per annum compounded on the amount of the plaintiff's demand for judgment beginning at the date the demand was made as determined by the court record; but

(b) If the amount of the judgment is less than the amount of the plaintiff's unaccepted demand, the defendant shall pay the judgment, less all the reasonable fees, costs and expenses accrued by the defendant in defending the case after the date the demand was made. These reductions shall be made before any computation or payment of a fee for plaintiff's lawyer is made.

3. At any time within ninety (90) days of the date of plaintiff's demand, the defendant may file a counter

offer to settle on the record of the litigation. If the counter offer to settle is not accepted and the litigation continues to the point that the plaintiff has obtained a final and binding judgment and if the amount of the judgment exceeds the amount of the plaintiff's unaccepted demand,the sum on which the plaintiff shall be entitled to receive interest shall be the amount of the plaintiff's demand minus the amount of the defendant's offer, beginning at the date the demand was made as determined by the court record.

If the action is against joint and several tortfeasors, the amount of the offer shall be the sum of valid independent and separate offers and the liability for interest on the difference between the demand and the offer shall be a joint and several liability.

4. Within the respective ninety (90) day periods prescribed for making demands and offers, each party may make a series of demands or offers with each succeeding demand or offer revoking its predecessor.

5. Although the parties are expected and encouraged to continue settlement negotiations throughout the litigation, no demand or offer made after the expiration of the respective ninety (90) day period shall be filed in the records of the court, except by special leave of the court, none shall revoke the last complying outstanding demand or offer, and none shall invoke the operation of these provision as to itself.

The Task Force considered two other proposals for providing disincentives for delay in the civil justice system. The first proposal was to allow prejudgment interest in personal injury actions. The second was a proposal to increase the rate of prejudgment interest or court costs in cases which took longer to resolve.[52] Because of the Task Force preference for the "Mandated Demand for Judgment Plan," no action was taken on these other options.

4. Alternative Dispute Resolution Processes

The Final Fact-Finding Report on Insurance and Tort Systems[53], describes the costs of the dispute resolution process including both attorney's fees and delay.[54] It concludes that for every dollar spent by insurance companies for claims payments, attorneys (both plaintiffs' attorneys' and defense counsel) received between 38 and 50 percent of the total amount expended.[55] Further, legal defense costs have escalated rapidly during recent years.[56] Both plaintiff and defense lawyers surveyed by the Task Force research staff expressed frustration with delay in the legal process, even though Florida courts appear to be more expeditious in resolving cases than courts in most other jurisdictions.[57]

Concerns about these issues of the cost and delay in the dispute resolution process have lead in recent years to a flowering of interest in "alternative dispute resolution."[58] The 1987 Florida Legislature enacted the Mediation and Arbitration Act.[59] State and federal courts in Florida currently are engaging in a variety of experimental efforts and pilot projects

using alternative dispute resolution mechanisms.

Three alternative dispute resolution processes appear to have potential to reduce the costs and delay of Florida's tort litigation system. Arbitration, as defined by recent Florida legislation, is a process whereby a neutral third party or panel listens to the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding.[60] The goal of binding arbitration generally is to provide an adjudication which is less expensive, more informal and more expeditious than a full jury trial. On the other hand, nonbinding arbitration generally is seen as a facilitator of voluntary settlement.

Mediation, as described in the 1987 legislation, is a process whereby a third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be.[61] Mediation is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

Finally, although not addressed in the 1987 legislation, federal and state courts in Florida are using one other type of alternative dispute resolution mechanism in tort litigation. In a summary jury trial, counsel for each party to a dispute makes a truncated best-case presentation before a mock six-member jury impaneled by the court from the regular list.[62] The jury's verdict is not binding on the parties; rather, it serves as a basis upon which to build a mutually acceptable settlement. The mini-trial is a somewhat similar proceeding in which the

truncated presentation of evidence is made in the presence of th top official with settlement authority from each side, as well a a neutral decision-maker in most cases. After the presentatio of evidence, the top officials for the two parties try to settl the case. If they are unable to do so, the neutral decision maker renders a nonbinding advisory opinion and negotiation continue.

Except for binding arbitration, these alternative disput resolution processes reduce costs and delay by facilitating th negotiation process. They address the impediments to settlemen identified in the Task Force Survey of Florida Tort Lawyers.[6] Most importantly, nonbinding assessments of the likely outcome o a tort litigation, whether achieved through nonbindin arbitration, summary jury trials or the substantive suggestion of mediators, provide reasonable settlement figures around whic further negotiations may proceed. This figure may aid counsel fo either party in overcoming her client's recalcitrance.[64] Further, it allows counsel to propose a settlement in the rang of the nonbinding assessment without concern that a reasonabl offer or demand will be seen by opposing counsel as a sign o weakness. The figure suggested by the summary jury trial, arbitrator or mediator possesses an appearance of objectivity an finality that diminishes opposing counsel's expectation that because an attorney has conceded this much, substantially mor will be conceded in the future.[65] Finally, arbitration, summary jury trials and frequently mediation processes require counsel t prepare their cases and understand their reasonable settlement values earlier than in cases in which ADR processes are not used.

As a result, lack of preparation of the case poses less of an obstacle to settlement. Accordingly, these alternative dispute resolution processes remove many of the impediments to early settlement that were identified in the Survey of Florida Tort Lawyers.

The Florida Legislature and Florida courts have moved effectively toward greater use of alternative dispute resolution processes during the past year. Following the work of the Study Commission on Alternative Dispute Resolution chaired by attorney David Strawn of Orlando,[66] the Legislature enacted the Mediation and Arbitration Act of 1987 which provides for court-ordered mediation and court-ordered arbitration, as well as voluntary binding arbitration. At the current time, the Supreme Court is considering a set of rules to implement this legislation.

The 1987 legislation does not include provisions covering summary jury trials, but some judges in both state and federal courts in Florida have began to use summary jury trials. Among the judges who use summary jury trial proceedings and are encouraged by the results are Circuit Court Judge Charles E. Smith of the Nineteenth Judicial Circuit (Indian River), Circuit Court Judge Gilbert Goshorn, Jr. of the Eighteenth Judicial Circuit (Brevard) and Judge William Terrell Hodges of the federal district court for the Middle District of Florida. Professor James Alfini of the Supreme Court Administrator's Office Dispute Resolution Center and Florida State University College of Law currently is studying the value of summary jury trials in a research project funded in part by the Florida Bar.

The Task Force supports these ongoing efforts to initiat alternative dispute resolution processes in Florida and i encouraged by the variety of approaches which are being tested In the view of the Task Force, what is most needed at this tim for alternative dispute resolution processes to begin to reduc expense and delay in the tort systems is not creative new ideas but rather whatever additional "bricks and mortar" may be neede to implement alternative dispute resolution mechanisms. Specifically, the Task Force is concerned with trainin professional mediators and other dispute resolution specialist who have the qualifications to faciliate resolution of tor disputes and with educating lawyers and judges who handle tor cases about alternative dispute resolution techniques. Fo certain kinds of alternative dispute resolution techniques, suc as nonbinding arbitration, in which the arbitrator's primary rol is to serve as a case evaluator, attorneys without considerable specialized training probably can serve effectively. Other types of alternative dispute resolution techniques, such as mediation, cannot be effectively performed without specialists with proper training in alternative dispute resolution techniques.

The eventual success of alternative dispute resolution techniques in reducing the costs of the tort system well may depend upon the qualifications and education of mediators, arbitrators and those working with summary jury trials. If compensation or the requisite credentials for alternative dispute resolution specialists are set artifically low, it well may be an example of the "penny-wise, pound-foolish" maxim for the legal system. Accordingly, the Task Force recommends the following:

1. The Legislature should provide adequate funding for demonstration pilot projects and for educational programs for mediators, arbitrators and other dispute resolution specialists.

2. The Legislature should enact provisions to assure that alternative dispute resolution specialists including mediators, arbitrators and other specialists who can facilitate summary jury trials are adequately compensated for their participation in the civil justice system.

3. The Florida Bar should be encouraged to inform lawyers practicing in the tort area about the benefits of alternative dispute resolution techniques and the specifics of how they work.

The Task Force also suggests that summary jury trials may hold particular potential for encouraging settlement and reducing litigation costs for larger, more complex tort cases such as products liability or medical malpractice cases. If studies currently underway in Florida suggest the efficacy of summary jury trials in reducing delay and litigation costs in tort litigation, then the Legislature should consider legislation facilitating the use of summary jury trial proceedings by trial court judges in the same manner that the 1987 legislation facilitated the use of mediation and arbitration by trial court judges.

FOOTNOTES
(Section I.D.)

[1]FINAL FACT-FINDING REPORT ON INSURANCE AND TORT SYSTEMS, p. 236 (March 1, 1988) (hereinafter referred to as "FINAL FACT-FINDING REPORT").

[2]Id., p. 241.

[3]Id.

[4]Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501, 505 (Fla. 1982), adopting frivolous standard of Treat v. State ex rel. Mitton, 163 So. 883, 883-84 (Fla. 1935). Florida attorneys also are bound by Rule 4-3.1 of the Rules of Professional Conduct promulgated by the Supreme Court. This rule provides, in pertinent part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . .

[5]Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 MINN. L. REV. 1, 36-37 (1976).

[6]S. MEDINA, M. HENEFIN, & T. CONE, A SUPPLEMENTAL ANALYSIS OF REPORTED DECISIONS APPLYING THE 1983 AMENDMENTS TO RULES 11, 16 AND 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE (February 22, 1985) (available in Columbia Law School Library), cited in S.M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Federal Judicial Center 1985).

[7]AMERICAN BAR ASSOCIATION, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM, 35-36 (February 1987). See also REPORT TO THE AMERICAN BAR ASSOCIATION OF THE SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, 13-8 (1984) ("we acknowledge that a certain percentage of suits which occupy the time of American courts are of legal value so doubtful that lawyers ought not to have brought them").

[8]An alternative approach to Rule 11 sanctions is to allow a counterclaim in tort against any party who asserts a frivolous claim or defense. In 1986, Georgia adopted such a remedy through a combination of legislation, see GEORGIA CODE ANNOTATED 9-15-14 (1986), and judicial action. See Yost v. Torok, 344 S.E. 2d 414 (Ga. 1986). This remedy allows a party to recover reasonable attorney's fees, litigation expenses and other damages by pleading a counterclaim in tort in the original suit when it alleges that the opposing party's claims or defenses lack substantial justification or are imposed for

purposes of delay or harassment. In other words, if a party believes that a claim or defense is frivolous, it can counterclaim in the same proceeding for attorney's fees and other damages instead of waiting for termination of the original proceedings. The Yost case made such a claim a compulsory counterclaim in the original action so that the prospect of "never-ending litigation" was eliminated. 344 S.E.2d at 418. Under the Georgia standards, liability in tort is established when:

> (1) there exists such a complete absence of any justiciable issue of law or fact that any party reasonably could not believe that a court would accept the asserted claim, defense, or other position; or
>
> (2) any party brings or defends an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment. The Georgia Supreme Court defined "lacks substantial justification" to signify conduct which is substantially frivolous, substantially groundless or substantially vexatious; or
>
> (3) any party unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures.

There are important differences between the Georgia approach and Federal Rule 11. First, this approach allows recovery of all damages otherwise proper under Georgia law, not just attorney's fees and litigation expenses, including damages for mental distress and nominal damages in some cases. Second, the approach is broader in scope than Federal Rule 11 and covers, among other things, discovery abuses and other parts of proceedings brought for improper purposes including delay or harassment. Third, under the Yost case, the counterclaim is tried by the same fact-finder as the original claim. In many cases this will be a jury proceeding, although the jury is not informed of the counterclaim until after it has heard the original claim. On one hand, jury trial of such a claim in some instances will result in more litigation and greater expense. Further, juries probably are not as well-equipped as judges to rule on the validity of claims, defenses and other proceedings brought by lawyers. On the other hand, juries may be less deferential to lawyers' judgments than are judges, and the prospect of jury review of lawyers' actions may serve as a powerful check on lawyers' behavior.

Many other jurisdictions have provisions providing sanctions for frivolous claims and/or defenses. The differences between the statutes involve whether the violation is judged by a "reasonableness" or a "bad faith" standard and whether or not the attorney may be held personally liable. Most of the more effective statutes are similar to Federal Rule 11. Among the more interesting provisions are those suggested in the Uniform Product Liability Act, see Uniform

Product Liability Act, United States Department of Commerce (October 31, 1979)), and the statutes of Colorado, COLORADO REVISED STATUTE SECTION 13-17-102 (1986) and of Wisconsin, WISCONSIN STATUTES, SECTION 814.025 (1978)).

[9]FINAL FACT-FINDING REPORT, 401-08.

[10]One approach would be to abolish all limits on contingency fee agreements in the state of Florida. There are two arguments supporting this alternative. The first is that the private market system should be allowed to set the rates for plaintiffs' attorneys. If contingency fees of 45 percent are too high, then other personal injury attorneys will offer their services at a contingency percentage rate of 40 percent, and the competitive market will result in a market price of comparable attorneys' services of 40 percent. The second argument is that the guidelines promulgated by the Supreme Court tend to become a floor, as well as a ceiling. The Supreme Court guidelines may become the standardized fee schedule and discourage price competition among attorneys.

In the Final Fact-Finding Report on the Insurance and Tort Systems, the Academic Task Force discussed the appropriateness of limitations on plaintiffs' contingency fees and the functioning of the private market as it relates to establishing rates for plaintiffs' attorneys:

> The Survey of Florida Attorneys (Plaintiffs) found that relatively little bargaining occurs between lawyers and plaintiffs in the setting of fees. According to the Survey, only 6.4 percent of clients attempt to negotiate fees with their attorneys, and only 11.3 percent "shop-around" and compare the qualifications of attorneys and their fees. Fee schedules tend to be "set in stone" without bargaining between attorney and client. The attorney generally makes no individualized determination of how much time, effort and expertise is required by a case. On the average, according to the survey, attorneys modified their standard fee schedule only six times during the year 1986. The Survey paints a picture of something other than a competitive market in which competition can be relied upon to drive down the costs of attorneys' fees. Instead, fees are standardized, perhaps as a result of past practices when bar associations promulgated minimum fee schedules. In addition, clients---perhaps not in a position to argue over fees because of feelings of extreme need following a personal injury, or because of deference to the legal profession---do not tend to bargain over legal fees. Under these

circumstances, in which the market economy is not functioning to protect the interests of the clients, limitations on fees are appropriate. FINAL FACT-FINDING REPORT, pp. 407-408.

[11]Contingent fee contracts are prohibited in England and in most other countries. How then are claimants' attorneys compensated for services in these countries?

Under the so-called "English rule," the prevailing party to a lawsuit recovers its reasonable attorney's fees, in addition to its judgment, from the losing party. The English system produces substantially different incentives for both plaintiffs and defendants during the litigation process and also requires courts to determine the amounts of reasonable attorney's fees in all cases in which the rule applies. In actual operation in England, the winner pays a substantial portion of its own costs; a rough estimate was that in 1984 an average of 20 percent of the fees and other litigation costs of the prevailing parties were paid by the winners themselves. A. TOMKINS & T. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN AND FEDERAL COURTS, 9 (1986).

The most important consequence of the English rule probably is that it discourages parties from asserting either claims or defenses to claims when there is any substantial risk that the claim or defense will not prevail. As noted in the Final Fact-Finding Report on the Insurance and Tort Systems, "the practice of law is not an exact science consisting of placing routinized or standard facts into well-defined pigeonholes," but instead "is a continually evolving process which means that the outcome of a case cannot always be predicted in advance by the plaintiff's attorney or anyone else, for that matter."Id., 236. In view of this reality, if plaintiffs' attorneys are not compensated unless they win, they likely will be deterred from filing many claims which ultimately probably would be found meritorious but which pose significant risks. As the size and complexity of the case increases, and therefore the amount of lawyering effort required increases, so would the reluctance of plaintiff's counsel to pursue the claim. To some extent, the English rule may be desirable. There probably would be less frivolous claims; the trade-off, however, is that many meritorious claims would not be adjudiciated.

The English fee-shifting rule probably would increase dramatically the filing of claims in which liability is readily apparent, but damages are small. For example, the English rule would allow a claimant with a modestly-sized consumer complaint to sue and to recover attorneys' fees that might exceed substantially the amount of the claim. Under the current fee systems, this complaint, although meritorious, probably would not be filed. This consequence of fee shifting can be seen as both a benefit and a detriment. On one hand, more claimants recover on meritorious claims. On the other

hand, total claims costs and attorneys' fees for smaller claims would increase significantly.

One problem with fee-shifting in operation is that claimants frequently are judgment proof, and therefore an award of attorney's fees and litigation costs against them may not compensate the defendant at all. The risk is that fee-shifting in reality tends often to be a one-way phenomenon in which defendants compensate prevailing plaintiffs for fees and costs, but prevailing defendants are left to pay their own fees and costs. Over the long term, however, fee-shifting benefits defendants by discouraging the filing of claims of questionable liability.

The other major issue surrounding fee-shifting is the requirement that courts determine, in every case, what constitutes a reasonable fee. The English system has developed a rather elaborate bureaucracy of specialized "taxing masters" to determine reasonable attorney's fees. A. TOMKINS AND T. WILLGING, supra, at ix-x, 31-47. A centralized Supreme Court Taxing Office has both original and appellate jurisdiction over virtually all determinations of fees and costs. The taxing masters determine what work was done by each attorney, whether the work was reasonable in the context of the case and the rate of remuneration, including profits, appropriate to the case.

In the United States, only Alaska has enacted a comprehensive fee-shifting system for civil cases. Id., 49 - 77. In most cases, the amount of the fee is determined by the amount of the recovery of the winning party. Where there is no recovery upon which to base an award or in other situations in which such a schedule would not adequately reflect the value of the attorney's fees, the court makes its own determination of what constitutes a "reasonable fee." The schedule used as a starting point is as follows:

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

The Alaskan system does allow the attorney to receive additional compensation from his client in addition to the court awarded fee. In most cases, the court-awarded fee accounts for between 20 percent and 80 percent of the total fee.

In cases in which the schedules are used to award attorney's fees, attorney fee determinations have become a part of routine motion practice in Alaska and are contested rarely. Contested reasonable fee cases involve more judicial time and frequently result in the judge carefully reviewing a fee petition, similar to a lawyer's itemized legal bill, on an item by item basis.

Aside from these comprehensive fee-shifting systems in England and in Alaska, the losing party pays the winning party's attorneys' fees under many specialized statutes (particularly federal statutes) and in a small number of common law exceptions to the "American rule." When federal courts determine the amount of "reasonable attorney's fees," they first multiply the compensable hours expended on the case by the attorney's reasonable hourly rate ("lodestar" calculation) and they then adjust for a variety of other factors including the novelty and difficulty of the issues; the skill required to perform the legal service properly; the preclusion of other employment as a result of handling the case; the results achieved; the customary fee; the experience, reputation and ability of the attorneys; and several other factors. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166-68 (3d Cir. 1973).

Federal judges report that they spend up to 10 percent of their time each month on fee matters, and the number of fee petitions handled each month by judges varies from one to fifteen, according to a Federal Judicial Center Report. A TOMPKINS & T. WILLGING, supra note 11, at 60-77. Often fee setting is delegated to federal magistrates.

The Florida Supreme Court accepted the "lodestar" approach for determining "reasonable attorney's fees in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (1985), which interpreted a fee-shifting provision under the 1975 medical malpractice reform legislation which has since been repealed. Id., 1151-52. In Rowe, the Supreme Court stated:

> In summary, in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on the claim. Id., 1150.

Specifically the court suggested that the lodestar figure be adjusted by a factor in the range of 1.5 to 3 to compensate for the risk in contingency cases. Adjustments also could result from a variety of factors similar to those used by the

federal courts. Rules Regulating the Florida Bar, Rule of Professional Conduct 4-1.5 (1986).

[12]Another approach would be to have the court determine the reasonableness of the plaintiff's attorney's fee on a case-by-case basis, but not to provide for payment of the prevailing attorney's fees by the opposing party. Current Supreme Court rules governing the bar provide for review of contingent fees by the trial court, but this review process is not nearly as stringent in most cases as are the fee-setting procedures in most fee-shifted cases. It is possible that the trial court could use the adjusted lodestar approach to determine the amount of the fee to be paid by the plaintiff to his attorney and that the attorney would be limited to this fee.

If this process of establishing a reasonable fee worked as anticipated, each fee would be more likely to reflect the attorney's reasonable work than would a fee determined on a contingency basis. The net result probably would be a sizable reduction in fees in cases with large awards. Unless limited to a percentage as an upward limit, fees in some smaller cases actually could increase. The biggest problems with this approach, however, are the difficulties faced by the courts in determining reasonable fees for all tort cases. It is likely that a "fee bureaucracy" similar to the English taxing system would need to be established. Further, this proposal pits the interests of the attorney against the interests of the client in every personal injury case. Finally, under the English fee-shifting system, the opposing party has the necessary incentive to contest excessive fee demands. Under this proposal, only the client has the incentive to contest the fee determination and the client may not posses the understanding of attorney's fees necessary in order to contribute in a meaningful and constructive manner to the process of establishing his attorney's fee.

[13]Some opponents of the contingent fee system believe that plaintiff's attorneys should be compensated on an hourly fee basis in a fashion similar to the compensation of most other attorneys. One problem with this approach is that many injured claimants do not have sufficient resources to hire qualified legal counsel on an hourly fee basis. The Final Fact-Finding Report on the Tort and Insurance System noted:

> Many Floridians, particularly following a disabling physical injury and the resulting financial hardships, would not be able to afford attorney's fees for even a claim of modest complexity. Assuming that plaintiffs' attorneys' fees would be about the same as defense attorney's fees in average case, then the average injured plaintiff would need to have four or five thousand dollars available to pay an attorney. In the most complex cases involving severe injuries, the amount necessary to hire quality legal representation would be many times more than this, and only the most

affluent members of society would be able to hire competent counsel. Id., 402.

One possible approach to this reality is to socialize the system by providing public tort lawyers similar to public defenders or legal services attorneys. Because tort cases are frequently substantially more complex and expensive than the type of routine matters usually handled by legal services offices, this approach probably would result in a massive and expensive government tort bureaucracy for plaintiffs. It is highly doubtful that the quality of legal representation from this office of government tort attorneys would be of as good a quality as that provided under the current system or some modification of it.

[14]One particular source of inefficiency in the legal system is the practice of lawyers in referring a client and his tort claim to another attorney specializing in personal injury litigation and often receiving a substantial portion of the contingent fee ultimately realized for the referral. In some cases, the referring attorney may work closely with the "primary" or trial attorney, contributing substantial assistance to the handling of the claim and providing a local, more familiar contact point for the client. In other cases, referring attorneys are little more than "brokers" who transfer all or almost all of the case responsibility to another attorney and are paid for providing the trial attorney with the "asset" of an unlitigated claim.

A recent Florida Bar Study Commission found the practice of "brokering" cases without providing substantial services to be increasing as a result of the development in the past few years of aggressive lawyer advertising. THE FLORIDA BAR, REPORT OF THE SPECIAL COMMISSION TO STUDY CONTINGENCY FEES AND REFERRAL PRACTICES, 5 (November 1986). Specifically, the Report of the Special Commission to Study Contingency Fees and Referral Practices found:

> (a) There are lawyers who regularly refer out all or a high percentage of their personal injury or wrongful death cases to other attorneys, even though they advertise to the public they handle those type of cases.
>
> (b) Some lawyers ask and receive a referral fee approximately or equal to 50% of the fee collected, with no further involvement with the case.
>
> (c) Some lawyers will "shop around" a personal injury or wrongful death case and refer to the lawyer or law firm which will pay the highest referral fee.
>
> (d) Lawyers who handle a large number of personal injury matters or who limit their practices to that area often will reduce their fees to the client if there is no referral fee being paid to another lawyer. The fee

is apparently seldom reduced if the handling lawyer has to pay a referral fee to another lawyer. Id., 9.

The Report also noted that there were some members of the Bar who advised the Commission that no additional regulation of referral fees was needed because they believed the marketplace provided the "proper perspective and amount." Other attorneys, according to the Report, suggested that "referral fees" be abolished, except for work actually performed.

The Commission recommended changes in the rules governing referral fees which required lawyers to provide factual information about attorneys fees and limited the fee of the referring attorney to 25 percent of the total contingent fee unless there was judicial approval of a higher percentage. Id., 7. On October 22, 1987 the Florida Supreme Court approved rules similar to those recommended by the Bar, including a limitation of referral fees to 25 percent of the entire contingent fee.

The new rules on referral fees should reduce the amount of referral fees in many cases and ameliorate the practice of "shopping around" for higher referral fees. If the plaintiff's attorney's fees market is a competitive one, the reduction in referral fees should result in lower contingent fees. If it is not, as the Final Fact-Finding Report on Insurance and Tort Systems suggests, then these limitations on referral fees simply may increase the contingent fees received by the attorney primarily handling the case. Arguably this creates further justification for more stringent limits on contingent fees overall.

The Task Force concluded that time should be allowed to see whether the new Suprmeme Court rules on referral fees work. If they do not, an alternative would be to restrict referring attorneys to a reasonable fee calculated on the basis of the amount of work actually performed by the referring attorney on a reasonable hourly rate. This reasonable hourly rate should reflect both the ordinary market prices for the attorney's services and some upward adjustment to compensate the attorney for the risk that some of his referred personal injury cases will not result in claims payments and therefore will not result in any contingent fee. Proponents of restricting referral fees to risk-adjusted reasonable fees would argue that attorneys should be compensated for the reasonable value of their professional services. For the referring attorney who does little or no work on a case, the referral fee is more like treating the injured client as a fortuitous asset who happens to walk in the door. On the other hand, if referral fees are prohibited, an attorney who probably would have referred a case to a well-qualified personal injury expert if he could receive a referral fee, might instead handle the case with less skill and negotiating credibility than the personal injury expert.

[15]FINAL FACT-FINDING REPORT, 406-07.

[16]AMERICAN BAR ASSOCIATION, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM, 25-30 (February 1987).

[17]CAL. BUS. & PROF. CODE 6146(a)(1987). These limits were increased from lower amounts in 1987 by Senate Bill 241. Earlier, contingent fees on amounts over $200,000 were limited to 10 percent. Experienced and highly qualified personal injury attorneys apparently were unwilling to represent claimants under the previous restriction. The revisions were a compromise agreed to by lawyers, physicians and insurance companies. Unlike the current Florida guidelines, these amounts are binding limits and there is no provision under California law to apply to a court in order to have a higher fee approved.

[18]The amount of plaintiff's fees for each size of payment would be as follows under the California schedule:

Size of Claims Payment (Net after litigation expenses)	Amount of Contingent Fee
$50,000	$20,000
$100,000	$35,500
$600,000	$160,500
$1,000,000	$220,500

For the largest size claims payment category, $1,000,000, where the California limits are most severe, an attorney receives a $220,500 fee which is the equivalent of 1470 billable hours at $150 per hour.

[19]FINAL FACT-FINDING REPORT, 408-417.

[20]Id., at 411-14.

[21]Id., at 415.

[22]See AMERICAN BAR ASSOCIATION'S ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, REDUCING TRIAL COURT COSTS AND DELAY: A SUMMARY OF FINDINGS (August 1984); B. MAHONEY, L. SIPES & J. ITO, IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS (NATIONAL CENTER FOR STATE COURTS, 1985); P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY (INSTITUTE FOR CIVIL JUSTICE, 1981); S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (FEDERAL JUDICIAL CENTER, 1977); J. ADLER, W. FELSTINER, D. HENSLER, M. PETERSON, THE PACE OF CIVIL LITIGATION (Institute for Civil Justice, 1982).

[23]See AMERICAN BAR ASSOCIATION'S ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, REDUCING TRIAL COURT COSTS AND DELAY: A SUMMARY OF FINDINGS (August 1984).

[24]FINAL FACT-FINDING REPORT, 418-425.

[25]Id.

[26]Id., at 422-23. The report adds a cautionary note that the apparent difference may be attributable to the fact that the Florida survey was limited to a group of experienced tort trial lawyers.

[27]Id., at 424.

[28]Id.

[29]Id., at 424-25.

[30]See SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (Federal Judicial Center 1978), hereinafter cited as SURVEY ON DISCOVERY. More recent writings are cited in Alliance of American Insurers, Advancing Justice 26-27 (1987), hereinafter cited as ADVANCING JUSTICE.

[31]See SURVEY ON DISCOVERY, supra note 30, at 67.

[32]Id. at 66-69; and see J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 420-23 (1985), (hereinafter cited as "CIVIL PROCEDURE.").

[33]See H. TRAWICK, FLORIDA PRACTICE AND PROCEDURE 205 (1985).

[34]See CIVIL PROCEDURE, supra note 32, at 423.

[35]Federal Rules of Civil Procedure 26(f); see Advisory Committee Note to the 1980 Amendment of Rule 26(f), reprinted in 85 F.R.D. 521, 527.

[36]Federal Rules of Civil Procedure 26(g); see Advisory Committee Notes to the 1983 Amendment of Rule 26(g), reprinted in 97 F.R.D. at 165, 213.

[37]Federal Rules of Civil Procedure 26(b)(1); see Advisory Committee Notes to the 1983 Amendment of Rule 26(b), reprinted in 97 F.R.D. at 172, 217-218.

[38]These alternatives were reviewed in the DISCUSSION DRAFT, TORT REFORM ALTERNATIVES 150-52 (December 16, 1987).

[39]See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE, 432-35 (1985) hereinafter cited as CIVIL PROCEDURE; TRAWICK, supra note 32, at 337-47.

[40]Florida Rules of Civil Procedure 1.510.

[41]Federal Rules of Civil Procedure 56.

[42]Art. V sec. 2(a), 1968 Florida Constitution.

[43]See Holl v. Talcott, 191 So.2d 40, 48 (Fla. 1966).

[44]Florida Rules of Civil Procedure 1.510(c).

[45]See Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Holmes v. Forty-five Twenty-five, Inc., 133 So.2d 651 (Fla.App. 1961); TRAWICK, supra note 33, at 339; CIVIL PROCEDURE, supra note 39, at 439.

[46]See Holl v. Talcott, 191 So.2d 40, 47-48 (Fla. 1966).

[47]Matushita Electic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, ____U.S.____, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., ____U.S.____, 106 S. Ct. 2505 (1986); and see Childress, New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 184 (1987).

[48]Two of the three cases cited in the preceeding note, were tort claims (Celotex, products liability; Anderson, defamation).

[49]See Holl v. Talcott, 191 So.2d 40 (Fla. 1966), and compare Pritchard v. Peppercorn and Peppercorn, Inc., 96 So.2d 769 (Fla. 1957); Landers v. Milton, 370 So.2d 368 (Fla. 1979); see TRAWICK, supra note 33, at 341-42.

[50]See Advisory Committee Notes to the 1963 amendment of Federal Rule 56(e), reprinted in 31 F.R.D. 648 (1963); CIVIL PROCEDURE, supra note 39, at 440-41.

[51]See TRAWICK, supra note 33, at 337: "Florida courts have followed a more restrictive course in using the rule than federal courts so that it has lost some of its utility in Florida practice."

[52]This proposal is an option designed to provide substantial additional financial incentives for both the defendant and the plaintiff to resolve cases more quickly.

Under this proposal, when a plaintiff's case is resolved within 6 months after the filing of the complaint, the defendant would pay, and the plaintiff would receive prejudgment interest from the date of the filing of the complaint at a specified rate approximately reflecting prevailing interest rates (e.g., six percent). This would reduce or eliminate any incentive a defendant or insurer might have to slow resolution of the case in order to realize a return on the funds that ultimately will be paid to the

plaintiff. This prejudgment interest also will serve to "make the plaintiff whole" as of the date of the filing of the complaint.

This proposal then imposes a series of incrementally increasing costs on both the plaintiff and the defendant as the case takes longer to be resolved through settlement or trial:

(1) If the case is settled or tried more than six months after the filing of the complaint, but less than one year after the filing of the complaint, the defendant will pay the court a sum equal to 150% of the interest rate specified by the legislature (e.g., 9 percent). From this amount, 50 percent of the interest rate specified by the legislature (e.g., 3 percent) will be paid to the plaintiff as pre-judgment interest. The remaining amount added to the judgment will be retained by the court as supplemental court costs.

(2) If the case is settled or tried more than one year, but less than two years after the filing of the complaint, the defendant will pay the court a sum equal to twice the interest rate established by the legislature (e.g., 12 percent). The plaintiff will not receive any pre-judgment interest. The interest paid to the court will be retained by the court as supplemental court costs.

(3) If the case is settled or tried more than two years, but less than three years after the filing of the complaint, the defendant will pay the court a sum equal to 2 1/2 times the interest rate established by the legislature (e.g., 15 percent). This interest payment will be retained by the court as supplemental court costs. In addition, the payment to the plaintiff will be reduced by a percentage equal to one half of the interest rate established by the legislature (e.g., 3 percent) and this amount will be retained by the court as supplemental court costs.

(4) If the case is settled or tried more than three years after the filing of the complaint, the defendant will pay the court a sum equal to 3 times the interest rates established by the legislature (e.g., 18 percent) as supplemental court costs. The plaintiff's judgment or settlement will be reduced by the percentage established by the legislature (e.g., 6 percent) and this amount will be retained by the court.

The obvious intent of this proposal is to provide both parties with additional financial incentives to resolve cases as quickly as possible, and to counteract the incentives that may exist under the current system for both insurers and defense attorneys to delay. One member of the Task Force was concerned with this proposal because of the delays inherent in the litigation process in many courts which are not attributable to the parties themselves.

[53]FINAL FACT-FINDING REPORT.

[54]FINAL FACT-FINDING REPORT, 394-417.

[55]FINAL FACT-FINDING REPORT, 403-406.

[56]FINAL FACT-FINDING REPORT, 394-401.

[57]FINAL FACT-FINDING REPORT, 408-409.

[58]See generally e.g., ABA STANDING COMMITTEE ON DISPUT RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMEI (1987); ABA SPECIAL COMMITTEE ON ALTERNATIVE MEANS OF DISPUTI RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: BANE OR BOON TC ATTORNEYS? (1982); S. GOLDBER, E. GREEN, & F. SANDER, DISPUTI RESOLUTION (1985).

[59]Chapter 87-173 (1987).

[60]Fla. Stat § 44.301 (1987).

[61]Fla. Stat §301 (1987).

[62]ABA STANDING COMMITTEE ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER, 4 (1987).

[63]FINAL FACT-FINDING REPORT, 417.

[64]Id.

[65]Id..

[66]STUDY COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION, FINAL REPORT (February 1, 1986); STUDY COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION, FINAL REPORT (March 1, 1985).

II. RECOMMENDATIONS FOR INSURANCE REGULATION IN FLORIDA

A. Rate Regulation

1. General Structure

The Task Force evaluated Florida's existing structure for the regulation of commercial lines insurance rates as provided for by the Tort Reform and Insurance Act of 1986. The benefits and detriments of the existing regulatory approach were contrasted with those of other forms of insurance regulation previously described in the Final Fact-Finding Report on Insurance and Tort Systems.[1] The comparative advantages of each approach were considered in the context of how a change in the structure of rate regulation would affect insurance affordability and availability. The Task Force believes that no massive change in the form of insurance regulation in the state of Florida should be made unless it can be shown affirmatively that such a change would enhance the prospects for improvement in affordability and availability problems.

The Task Force recommends that the Legislature make no change in Florida's rate regulation procedures governing commercial lines at this time. The analysis of the Research Staff and the Task Force's own evaluation of the conflicting testimony presented by the Department of Insurance and by the insurance industry does not lead it to conclude that changes in Florida's regulatory approach would make liability insurance affordability or availability problems less likely. The Task Force does recognize that further review of the rate regulation process may be warranted in another five or six years, after

sufficient data becomes available to evaluate the effects of th 1986 rate regulation provisions.

a. Rate Regulation and Affordability

Because data are not available to test empirically tl effects of Florida's regulatory approach adopted in 1986, the Research Staff compared the effects of restrictive rating laws i other states with the effects of more liberal rating laws. Fo purposes of these statistical tests, restrictive laws were defined to include state made rates, mandatory rating bureau membership laws and prior approval laws; liberal laws included file and use, use and file, modified prior approval and no file laws. Flex rating is too new to test. Most of the analysis in the next two sections compares the effects of various regulatory approaches on the affordability and availability of automobile insurance, because more data is available regarding automobile rate regulation, prices and availability than for commercial lines. The Task Force believes, however, that there is no reason that this comparison of the effects of high regulation versus low regulation should not apply in the commercial insurance context.

No statistics are available to systematically measure the cost of insurance on a state-by-state basis. Consequently, loss ratios by state have been used as proxies for insurance costs. A loss ratio is calculated by dividing losses incurred by premiums earned.[2] The loss ratio measures the proportion of the premium used to pay claims. A high loss ratio indicates that insurers kept less of the premium for expenses and profits i.e., the frictional cost of the insurance mechanism was lower. In this

sense, "one minus the loss ratio" measures the cost of the insurance mechanism to society as a whole.[3]

A simple comparison of loss ratios would indicate that the liberal rating laws are more desirable. For example, in 1985, the loss ratio for private passenger auto liability insurance in states with liberal laws averaged 85.6 percent, while those for restrictive laws averaged 81.4 percent. The average for all states was 84.1 percent. However, there are several demographic and economic differences between the two groups of states. The states with the liberal laws tend to be more populous, more urbanized and more prosperous. It is possible that some of these factors may affect the loss ratios, therefore, a test of rating laws must control for such demographic and economic factors.[4]

An analysis was made of the loss ratio in private passenger auto liability, commercial auto liability and general (other) liability. When the analysis was controlled for the effect of relevant demographic and economic factors, neither the type of rate regulatory law nor the excess profit law proved to have a significant impact upon the loss ratio of any of these lines of insurance for any year.[5]

The statistical analysis of the Research Staff offers no support for the insurance industry's perception that the type of rating law in effect in a state is an important determinant of the loss ratio in that state. This does not support the proposition that the nature of the rate regulatory statute, the industry's perception of the de facto rate regulatory system or the existence of an excess profit statute affects the cost of insurance.[6]

b. Rate Regulation and Availability

The Task Force Research Staff also investigated the lin between rating statutes and availability problems. Insuranc industry executives state that restrictive rate regulator statutes may result in lack of insurance availability. Th Research Staff's statistical tests support this industr assertion.

The only practical statistical test for availability o insurance is the percentage of registered cars insured through residual market plans, such as JUAs and assigned risk plans.[7] Multi-regression analysis using this statistical test showed that the coefficient for the regulatory variable was negative in all years, indicating that liberal rate regulatory laws are associated with low populations in the residual market facilities. This supports the claim that states with restrictive automobile liability insurance rating laws may have more serious problems with the availability of automobile liability insurance.

Florida has a very low automobile JUA population, less than 0.05 percent of registered vehicles. This compares favorably with a 2.3 percent figure in California, a state usually cited by the insurance industry as a model of liberal rate regulation. This comparison suggests that in the area of automobile liability insurance, Florida's availability problems are not as severe as those in some states, such as California, with liberal rate regulation.

The Research Staff's statistical tests bear out the industry's perception that restrictive rate regulatory laws lead

to availability problems. However, this finding, when coupled with the low population in the Florida automobile JUA, tends to contradict the industry's perception that rate regulation in Florida, at least in the area of automobile liability insurance, is, in fact, restrictive.

The insurance industry also suggests that restrictive rate regulation discourages insurance companies from entering the market. The Research Staff completed a regression analysis to test this assertion.[8] The analysis showed that the number of active liability insurers is higher in states with more liberal rate regulation. To that extent, the industry's perception is supported. However, other empirical evidence does not support the industry's stated perception that Florida rate regulation is restrictive. Florida is fourth in the country in population but third in the number of companies writing private passenger auto liability insurance in 1985. Florida had 150 insurers writing private passenger auto liability in 1985, exceeded only by Illinois with 158 and Indiana with 156. California, with over twice the population of Florida had only 146. These figures do not bear out the industry's stated perception that Florida rate regulation is restrictive.

From this analysis, and its own independent evaluation of testimony from representatives of both the insurance industry and the Department of Insurance, the Task Force is not able to conclude that the overall approach to rate regulation adopted in the 1986 Reform Act is likely to contribute to Florida's problems with the affordability and the availability of liability insurance.

2. Hearings by Insurance Commissioner

The Task Force carefully reviewed a number of specific aspects of Florida's rate regulation process. Among other objections to the regulatory approach, the insurance industry objects to the possibility that in rate regulation procedures the Insurance Commissioner may designate himself as hearing officer, thus effectively becoming both prosecutor and judge. While the Commissioner's decisions can be appealed to the courts, where they are subject to review under the substantial evidence standard,[9] industry representatives fear that there is little chance that the courts will overturn a decision by the Commissioner based upon his own findings of fact. They propose that Florida Statute 627.0612 be amended to provide for a guaranteed right to a hearing before an independent hearing officer in rating matters.

Florida's Administrative Procedure Act provides for administrative hearings to be conducted by either the agency head or by an independent hearing officer.[10] This provision is not peculiar to the Department of Insurance but applies generally to all state agencies.[11] It follows the traditional pattern of administrative law in other states[12] and in federal practice,[13] recognizing that the agency's continuing responsibility for carrying out the policies assigned to it by the legislature may be implemented through adjudication of individual cases as well as by rule making.[14] The Task Force has been informed that in practice the Insurance Commissioner decides selectively to hear for himself those cases that have broader impact or more

important policy implications, leaving most other cases to be heard initially by an independent hearing officer.[15]

Florida Statute 627.0612, as created by the Tort Reform and Insurance Act of 1986, provides that when an independent hearing officer is used in rate proceedings, the appellate court may set aside a final order of the Department if it has substituted its findings of fact for findings by the hearing officer that were supported by substantial evidence. These same constraints are generally applicable to all administrative proceedings under the Administrative Procedure Act,[16] and Florida Statute 627.0612 was apparently intended to do no more than confirm their applicability to the new rate regulation proceedings authorized by the 1986 Act. In reviewing the agency's substituted findings of fact, the appellate courts probably will continue to recognize the distinction between "credibility" facts and "opinion" or "policy" facts, and give special deference to the agency's substituted findings in the latter category.[17] Such deference is motivated by judicial respect for the agency's special expertise and continuing responsibility for developing policy.

These same considerations militate against endorsing a proposed amendment that would deny the Insurance Commissioner the power given to other agency heads to conduct their own hearings when they deem it necessary or appropriate to discharge their responsibilities. The Task Force does not believe the proposed amendment is justified, absent a persuasive showing that insurance needs to be treated differently in this respect than other regulated industries, or a showing that the Insurance

Commissioner has misused the power given to all agency heads to conduct their own hearings.

Accordingly, the Task Force does not recommend any change in the 1986 rate regulation statute which would deny the Insurance Commissioner the power to conduct his own hearings.

3. Refund of Excessive "Use and File" Rates

The 1986 rating law requires that an insurer which employs the "use and file" option and subsequently fails to successfully defend its rates must return to each policy holder the portion of the rate that is found not to be actuarially justified by the Department of Insurance. The insurance industry finds this provision to be "most onerous" both because an insurance carrier runs the risk of writing insurance without knowing what portion of the premium the Department of Insurance will allow it to retain and because "the insurer faces the danger from a public image standpoint, of appearing to overcharge its customers."

The Task Force believes that the refund provision, applicable only to use and file rates, provides proper safeguards to the public. Without this provision, an unscrupulous insurer could file unreasonably high rates and collect large amounts of excessive premiums. The only recourse available to the Insurance Department would be to order the insurer not be make such overcharges in the future. The firm would be able to retain any excessive profits already earned. However, the excess profits law would permit recovery of the excess profit provided the insurer continued to operate in the state.

The Task Force recognizes that almost all insurers are responsible business firms and would not conduct their business

in the manner outlined in the preceding paragraph. However, laws are framed to protect the public against aberrant behavior, not against normal behavior. The Task Force believes that the refund provision, applicable only to use and file rate filings, provides proper and reasonable protection to the public.

The Task Force recommends no change in the statutory requirement that insurers electing the "use and file" procedure must refund to policyholders the portion of the premium found not to be actuarially justified.

4. Use of a Negative Underwriting Profit in Profit Calculations

The insurance industry has urged the Task Force to recommend a "floor" of zero on the underwriting profit factor for the excess profits calculation. The insurance industry argues that the present law allows the Department of Insurance "to require insurance companies to write insurance at an underwriting loss and then use a so-called 'negative profit factor' (which is really a 'loss' factor) as a starting point for calculating excess profits." The insurance industry notes that this is an "onerous feature which is not found in the auto rating law and is apparently unnecessary for public protection."

The Task Force does not believe that the Department of Insurance should be precluded from using a "profit and contingency" factor which is below zero. In a liability line in which there is a long delay before resolutions in claims, such as products liability and professional liability, investment income may be equal to or greater than 30 percent of earned premiums. The Task Force believes that the underwriting profit factor

should continue to be determined with due consideration to al income, including investment income, and to the risks involved i writing the business. To permit all of the investment income o these lines to pass down to profit, without being considered i the rate regulation and excess profits calculation, could provid an insurer with a rate of return which is out of proportion t the risks involved in the business. In other words, th Commissioner should have the flexibility to consider all factors and if these considerations result in his determination that negative underwriting profit factor should be used, the Tas Force believes that he should have that flexibility.

The Task Force recommends that no change be made in the rate regulation statute that would preclude the Department of Insurance from using a "negative underwriting profit factor" when approving rates.

FOOTNOTES
(Section II.A.)

[1]FINAL FACT-FINDING REPORT, 179-184.

[2]In these calculations, the premiums earned have been reduced by dividends paid to policyholders. Such dividends are actually refunds of excessive premiums collected.

[3]If data were available, the combined ratio (which include both claims and expenses) or the operating ratio (which includes claims, expenses and investment income) would be an even better measure of profitability. However, insurers do not report either expenses or investment income on a state-by-state basis. Consequently, the loss ratio is the best available measure of insurance cost among states.

[4]In order to control for demographic and economic factors, the Research Staff used stepwise multiple regression analysis to examine the potential influence of the following variables:

LOSSR = the loss ratio for each state;

URBAN = the percentage of the state's population living in metropolitan areas;

UNION = the percentage of the state's workers who are union members;

CARS1 = the number of registered motor vehicles per 1,000 of population;

CARS2 = the number of registered motor vehicles per 1,000 miles of public roads and streets;

INCOME = the per capita income for the state;

LAWYER = the number of lawyers per 1,000 of population;

CODE = a dummy variable for the type of rate regulation (0 = restrictive, 1 = liberal);

XSPROF = a dummy variable for excess profit laws, 1 if one exists in the state, 0 otherwise;

CRIME = the crime rate for the state as calculated by the FBI;

RESID = the percentage of private passenger autos in the JUA or assigned risk plan;

DIRECT = percentage of private passenger auto business written by direct writers;

STREET = percentage of urban roads to total ro
mileage in state; and

ISO = ISO's perceived de facto rate regulatory syste
a dummy variable with 0 for restrictive syste
and 1 for liberal systems.

The above variables are the ones that the Research Staf thought might affect the loss ratios within a state. Th Staff did not expect all of them to be related to the los ratio. The loss ratios and the direct writer market share were taken from Best's Executive Data Service for the year 1981 through 1985. The number of cars in the residual market was taken from Property/Casualty Fact Book, published by th Insurance Information Institute. The nature of state rat regulatory laws, excess profits statutes and the ISO' perceptions of de facto rate regulation were provided to th Research Staff by the Insurance Services Office. Al other variables were taken from or calculated from th Statistical Abstract of the United States.

The urbanization variable was selected for testing because residents of large urban areas generally are believed to be more litigious than rural residents. The percentage of urban roads is also an indicator of urbanization. The union variable was selected as an indicator of the size of the blue collar work force in the state. Some insurance industry observers believe that blue collar workers and their families are less litigious than white collar workers. The residual market variable was included because industry officials have stated that strict rate regulatory laws result in high usage of residual market facilities, such as JUAs.

Per capita income and the number of cars per 1,000 of population are both measures of wealth. The number of cars per 1,000 miles of public roads is a measure of traffic density. The number of lawyers per 1,000 of population was included for testing because many observers have suggested that an increase in the number of lawyers was one of the causes for increased litigation. The crime rate was included on the theory that a high crime rate might indicate a general deterioration of moral standards, which might be accompanied by increased litigation and more fraudulent claims. Finally, the direct writer market share was included for testing because some direct writers have lower expense ratios than independent agency companies. Consequently, the direct writers can sustain higher loss ratios.

The stepwise regression technique used by the Research Staff in this analysis adds independent variables to the regression equation in the order of their explanatory power. That is, the independent variable that contributes most to explaining the variation in the dependent variable (loss ratio) is entered into the regression first. In the second step, the remaining variable that adds most to the explanatory

power of the equation is added. This process continues until there are no remaining independent variables that meet the probability standard set for acceptance of a variable. The standard used here is the probability that the independent variable is not actually related to the dependent variable cannot exceed .05. In other words, the chance of entering the variable into the equation erroneously cannot exceed one chance in twenty.

[5]For private passenger auto liability for 1985 the regression equation without a constant term was:

$$LOSSR = 0.062\ CARS1 + 0.003\ INCOME$$

with R^2 = .978 and F-ratio = 1101.09 with two degrees of freedom. Results for private passenger auto liability were similar for other years 1981-1984, except that the urbanization variable and the crime rate variable each appeared in the equation for one year along with the INCOME and CARS1 variables.

The general liability regression equation for 1985 was;

$$LOSSR = 0.005\ INCOME + 0.008\ CRIME$$

with R^2 = .961, F-ratio = 603.7 and degrees of freedom = 2. The results for other years were similar.

The regression equation for commercial auto liability for 1985 was:

$$LOSSR = 0.007\ INCOME - 1.880\ LAWYER$$

with R^2 = .961, F-ratio = 610.5 and degrees of freedom = 2. Results for other years were similar except that the CRIME variable entered the equation in some years. Note that the coefficient of the LAWYER variable is negative. Taken at face value, this would indicate that the loss ratio falls as the number of lawyers increases. However, it seems more likely that the negative sign results from an interaction with the INCOME variable, since the number of lawyers is substantially correlated with per capita income (correlation coefficient = .398). When a simple regression is performed, using LAWYER as the only independent variable, the coefficient is positive. The interaction that produced the negative coefficient is known to statisticians and econometricians as multicollinearity.

[6]These findings are consistent with Kathleen Carlson, Open Cometition v. Prior Approval: Do Ratemaking Laws Make a Difference?, an unpublished paper submitted to the Illinois Insurance Committee on Tort Reform, May 1986.

[7]Using the same data and techniques as described above, t Research Staff constructed multiple regression models explain the percentage of cars insured in the residu markets. The equations for all years included the number registered motor vehicles per 1000 miles of public roads a streets and the variable for the types of rate regulation.

[8]The variables outlined above were used, and two new ones wer added; the number of companies writing private passenger aut liability insurance in the state and the population of th state. Private passenger auto liability insurance wa selected for the test because most of the premiums written i that line are due to a marketing effort made within th state. In contrast, much of the premiums written within man states in commercial lines represents the respective state' share of national accounts sold outside the state. The 198 equation for the number of companies selling private passenge auto liability within a state was:

$$COS = 0.003\ POP + 0.593\ URBAN + 0.059\ CARS1 - 0.0001\ CARS2 + 0.001\ INCOME + 16.6\ CODE$$

with $R^2 = .973$, F-ratio = 361.6 and degrees of freedom = 6.

A test of the impact of each variable on the number of companies in the state revealed that population was the principal determining factor, but the type of rate regulation also was important.

[9]Fla. Stat. §120.68(10).

[10]Fla. Stat. §120.57(1)(a)1.

[11]Id.

[12]See F.E. COOPER, STATE ADMINISTRATIVE LAW 331-34, 337-38 (1965).

[13]See B. SCHWARTZ, ADMINISTRATIVE LAW 289-96 (1976); K.C. DAVIS, ADMINISTRATIVE LAW TEXT 182-86 (1959).

[14]Id. at 185-86. In fact, the insurance industry's current position is an interesting reversal of the position frequently taken by regulated industries in the past. In the early history of most regulatory agencies, almost all hearings were conducted by agency heads. Independent hearing officers are a relatively recent development in administrative practice. When increasing business made it necessary for agencies to use independent hearing officers, regulated industries frequently complained that this practice was unfair because it deprived them of the opportunity to present their evidence directly to the agency head who had the ultimate responsibility for making a decision. See authorities cited supra at notes 12 and 13.

[15]In fact, the Department of Insurance has relatively little experience with rate hearings in connection with commercial liability lines, since its expanded authority in that area was established by the 1986 Act. Most of its experience with rate hearings has been in connection with workers' compensation and automobile liability insurance.

[16]Fla. Stat. §120.57(1)(b)10.

[17]See Comment, Judicial Review of Substituted Agency Fact-Finding, 35 FLA. L. REV. 153 (1983).

B. Excess Profits Laws for Commercial Lines

As already noted, the excess profits laws did not appear as an explanatory variable in any of the regression models constructed by the Research Staff. However, it is possible that this negative finding resulted from the small number of such laws in force during the test period. Only Florida, New Jersey and New York had such laws.

In order to facilitate further analysis of the Florida laws, the Florida Insurance Department furnished data regarding excess profits refunds for private passenger auto insurance (Table 1) and workers' compensation (Table 2). Table 3 shows a comparison of the auto excess profits refunds with Florida premiums written in the same year. Table 4 shows the same comparison for workers' compensation.

The auto refunds varied from three one-thousandths of one percent ($3 on each $100,000 of premiums) in 1984 to eight tenths of one percent ($800 on each $100,000 of premiums) in 1980. The average for the period was $107 per $100,000 of premiums.

The excess profits results for workers' compensation were of similar magnitude and averaged $173 per $100,000 of premiums. Naturally, some insurers will have paid a larger portion of their premiums in refunds; however, it is clear that for the state as a whole the existing excess profit laws did not significantly reduce insurance industry profits or provide significant refunds to consumers.

Perceptions of the excess profit laws are quite different. Many insurance industry representatives perceive the excess profits laws to be burdensome. Quite possibly, the public may

Table 1

FLORIDA
PRIVATE PASSENGER AUTO
EXCESS PROFITS

Year Excess Profits Identified	Years Excess Profits Earned	Excess Profits Amount*
Before 1979		$ 91,409,91(
1979	1976-1978	5,699,58{
1980	1977-1979	10,709,56)
1981	1978-1980	1,004,55{
1982	1979-1981	146,088
1983	1980-1982	168,703
1984	1981-1983	68,792
1985	1982-1984	337,416
1986	1983-1985	13,192
1987	1984-1986	1,759,477
Total		$111,317,286

* Includes excess profits already returned and excess profits identified but not yet returned. The 1987 amount is not yet complete.

Table 2

FLORIDA
WORKERS' COMPENSATION
EXCESS PROFITS

Year Excess Profits Identified	Years Excess Profits Earned	Amount of Excess Profits*
1981	1979-81	$1,466,855
1982	1980-82	855,780
1983	1981-83	1,023,918
1984	1982-84	1,147,878
1985	1983-85	1,184,482
Total		$5,678,913

* Includes excess profits already returned and excess profits identified but not yet returned.

Table 3

FLORIDA
PRIVATE PASSENGER AUTO PREMIUMS
AND EXCESS PROFITS

1980-1985

Year	Premiums Written	Excess Profits Refunds	Refunds as % of Premiums
1980	$1,391,788,616	$10,709,561	0.769%
1981	1,502,139,227	1,004,559	0.067
1982	1,764,822,834	146,088	0.008
1983	2,052,608,908	168,703	0.008
1984	2,276,848,576	68,792	0.003
1985	2,657,678,582	337,416	0.013
Totals	$11,645,886,743	$12,435,119	0.107%

Table 4

FLORIDA WORKERS' COMPENSATION
PREMIUMS WRITTEN AND EXCESS PROFITS REFUNDS

1981-1985

Year	Written Premiums	Excess Profit Refunds	Refund as % of Premiums
1981	$607,358,567	$1,466,855	0.242%
1982	503,886,198	855,780	0.170
1983	578,994,036	1,023,918	0.177
1984	706,396,674	1,147,878	0.162
1985	82,793,451	1,184,482	0.134
Totals	$3,279,428,926	$5,678,913	0.173%

perceive these laws to be necessary protection again overcharges, but the Task Force does not have any evidence this regard.

The Task Force recommends against repeal of the Exce Profits Law for commercial lines, provided that it is amended described below. The refunds under the existing automobi liability and workers' compensation excess profits laws have be so small as to be negligible. There is no apparent significar adverse effects on the insurance industry in Florida resultir from the automobile liability or workers' compensation exces profits laws. Further, excess profits laws may provide both th reality and the assurance of desirable protection against ove reaching by a few insurers.

The Task Force, however, believes that the four-year tes period for measuring profits is too short. As noted in the Fina Fact-Finding Report, insurance industry profits vary dramatically from one year to the next during the course of the insurance industry underwriting cycle. Because a typical underwriting cycle lasts about six or seven years, an accurate measure of insurance company profits should include at least six years of a company's experience. Accordingly, the the Task Force recommends that the Legislature amend the Excess Profits Statute to use a six year moving average for the calculation of excess profits.

The insurance industry has urged modification of the Excess Profits Laws so that they apply only to specific markets or insurance lines found not to be competitive. The Task Force

recommends against adoption of this amendment for the following reasons:

(1) The competitiveness of individual lines of insurance changes periodically and sometimes very quickly,

(2) The definition of an appropriate market is very difficult (e.g., it could be a city, a county, a part of a city, a kind of insurance, a type of a business such as daycare centers, or some other definition),

(3) A satisfactory measure of competitiveness has not yet been found by insurance experts, and statistics on insurance marketing are not available for areas of less than an entire state.

The Task Force also recommends against excluding restropectively rated policies from the Excess Profits Laws. As demonstrated above, excess profit refunds have been very small. Consequently, it is doubtful that the additional cost to adjust for retrospective rating would be justified. Also, retrospective rating plans are sometimes used to increase the premium of the insured deemed to be undesirable from an underwriting standpoint. In those cases, the plan may not fulfill its purpose of an efficient profit sharing device in the absence of an excess profits law. Accordingly, the Task Force recommends against any amendment which would exclude policies written on a retrospective rating plan from the operation of the Excess Profits Law.

C. Property and Casualty Joint Underwriting Associations

The Final Fact-Finding Report on Insurance and Tort Systems describes the operation of Joint Underwriting Associations in Florida.[1] In that report, it was determined that the existing residual market facilities for automobile and medical malpractice insurance in Florida are of modest size and have not been excessively expensive for the insurance industry in recent years. This section will address only the proposed commercial lines JUA, known as the Florida Property and Casualty Joint Underwriting Association (FPCJUA), that was authorized by the Tort Reform and Insurance Act of 1986. Further, the recommendations contained in this portion of the study address only the broad outlines of the commercial lines JUA. In the absence of any operating experience or even operating rules of the FPCJUA, the Task Force was limited to evaluating the terms of the enabling legislation and the results of the operations of other JUAs under the jurisdiction of the Florida Department of Insurance.

Based upon this evaluation, the Task Force recommends substantial modification of the law that established the commercial lines Joint Underwriting Association. The Task Force believes that the Legislature's decision to enact legislation providing for a commercial lines JUA was a desirable response to Florida's liability insurance availability problems, but that changes in the structure of the JUA which it created would benefit both Florida insurance consumers and Florida insurers.[2]

The Task Force recommends that any commercial joint underwriting association initially should be established only on

a "standby" basis. A subsequent finding of specific statutoril defined facts to establish a "determination of need" should b required before the JUA becomes operational. The Task Forc recognizes that if this recommendation is adopted by th Legislature many details will need to be resolved, but this i best accomplished by direct negotiations between representative of the Department of Insurance and the insurance industry.

This proposal for a "standby" JUA contemplates a two-ste procedure: the first being a "standby" stage and the secon being the operational stage. At the "standby" stage, th Department of Insurance would promulgate rules and develop a Pla of Operation for the JUA, following normal rule-making procedure under state administrative law. Because this "standby" stag would establish rules and structure for a JUA, the time it woul take to put a JUA into operation once a determination of need wa made would be significantly reduced. The JUA would not becom operational, however, until after a specific determination of need by the Department. This determination of need would be based upon a finding establishing an objective statutory standard, such as five percent of the relevant market unable to obtain coverage. When the JUA became operational, individual applicants would have to meet the eligibility standards prescribed by the present statute, both for initial coverage and for renewal.

There may be some cost involved in maintaining a stand-by JUA, even if it never writes any business. The Task Force believes, however, the expense is justified because of the sometimes arbitrary manner in which the insurance industry

decides who will be insured and who will not. Some years ago, the popular belief within the insurance industry was that drivers over age 65 were poor risks, with many more claims than younger drivers. Because of this belief, many persons over age 65 were placed in residual market facilities. When the insurance industry's own statistics were analyzed carefully, it was found that elderly drivers actually had fewer and less severe claims than younger drivers. Relatively few elderly drivers are in the residual market facilities today, but those facilities provided a safety net for them when they needed one. More recently, a flurry of publicity about child abuse in a California day care center caused much of the insurance industry to refuse to insure day care centers both in California and countrywide. The insurance industry expected a surge in child abuse claims. Now that the flood of claims has failed to materialize, insurers are moving back into the market. Other examples can be cited.

Also, the market for some kinds of insurance is very thin. Only a handful of companies write professional liability coverage for engineers, architects, lawyers and other professionals. If a major company decides to discontinue the line, many of its policyholders may be unable to find replacement coverage in the voluntary market. A stand-by JUA can quickly meet their needs.

The Task Force believes that this proposal is more advantageous to both insurance consumers and the insurance industry than the JUA currently provided by Florida law. This proposal would reduce the delay inherent in initially establishing the JUA structure and rules. Under the current law,

the establishment of the JUA provided by the 1986 Act has been tied up in litigation virtually since the Act was passed. The state remains a long way from having a functioning JUA, and in the meantime, most severe availability problems have passed. Unless the law is changed, an effective residual market mechanism may not be in place when the state next experiences a surge of liability insurance availability problems.

Conversely and ironically, liability insurers also prefer a "standby JUA" as described here to the existing JUA under Florida law. Once in existence, the JUA as provided under current law would be, in their view, an omnipresent threat and unfair competitor to private insurers. By establishing the structure and rules for a "standby-JUA" to be activated only upon the finding of a determination of need by the Department of Insurance established by the showing of specific statutorily-defined facts, the legitimate interests of both insurance consumers and liability insurers can be accommodated.

On a more specific point, the Task Force also recommends that insurers be permitted to show any assessment against insurers to fund a joint underwriting association as a separate surcharge when billing policyholders who must pay the assessment. This proposal is favored in the belief that insurance consumers are entitled to know how much they are paying for the protection provided to them by the JUA.

FOOTNOTES
(Section II.C.)

[1]FINAL FACT-FINDING REPORT, 187-190.

[2]This note describes and evaluates the principal allegations of the insurance industry regarding the FPCJUA as currently provided under Florida law.

First, the insurance industry asserts that the FPCJUA may sell insurance below cost and unfairly compete with the voluntary market.

The FPCJUA was authorized under Section 13 of the Tort Reform and Insurance Act of 1986. The act specifically provides that the FPCJUA shall write coverage only for those persons or firms who cannot get insurance in the licensed voluntary market, through the Market Assistance Program or from the surplus lines market. An insurance agent who submits an application for insurance to the FPCJUA must certify that the coverage could not be obtained from the foregoing sources, and is subject to prosecution if the certification is false. The Market Assistance Program was established pursuant to Florida statutes for the purpose of assisting in finding insurance for persons who are unable to find it through their own efforts. It cannot compel an insurer to write a risk it does not want to insure, but uses its knowledge of insurance markets and its powers of persuasion to find insurance for risks that are difficult to place. It can use either licensed insurers or surplus lines insurers. Furthermore, the enabling act specifically requires the FPCJUA to use rates that are actuarially sound for the risks assumed.

It is difficult to understand how the FPCJUA, writing only risks no insurance company wants, and charging actuarially sound rates for them, can be competing unfairly against individual insurance companies. The experience of other Florida residual market facilities indicates that unfair competition is unlikely. The auto JUA is one of the smallest among major states, with less than 0.05 percent of the market. The medical malpractice JUA has only 5% of the market and is operating at a surplus.

Second, the insurance industry objects to the possibility that it might be called upon to subsidize the unfair competition discussed above. This fear arises because a part of any deficit incurred by the FPCJUA would be recovered by assessing insurance companies, the balance being recovered by assessing FPCJUA policyholders.

At first glance this assessment provision may appear to require insurance companies to subsidize the FPCJUA. However, the insurance companies merely act as a conduit for the

subsidy. Any amount assessed against insurance companies i passed on to insurance consumers by increasing their insuranc premiums. In addition, any expenses incurred by insuranc companies because of participation in the FPCJUA also will b passed through to policyholders. Clearly, there is a dela between the time the FPCJUA levies an assessment and the tim that the insurer can recover the assessment through increase premiums. The delay, in most cases, will be slightly over on year. The Task Force recognizes that such a delay may impos a burden upon the insurance industry but does not consider i to be unmanageable or not worth the increased availabilit which a JUA provides.

Third, the insurance industry alleges that the FPCJUA i unusually broad with regard to the coverages offered. I examined in a vacuum, this allegation seems valid, since othe JUAs do not include property insurance as does the FPCJUA However, if examined within the pattern of all residual marke facilities, the allegation loses much of its validity.

Twenty-six states, the District of Columbia and Puert Rico have FAIR (Fair Access to Insurance Requirement) Plans Florida does not have such a plan and the FPCJUA can serv the purpose of a FAIR plan in Florida. FAIR plans are residua market facilities for property insurance. All of them writ fire and extended coverage for residential and commercia risks that are unable to obtain voluntary coverage. Some g beyond fire and extended coverage by offering homeowners an crime coverages. The legislation for the FPCJUA specifically prohibited it from providing crime insurance as long as the Federal crime insurance program is in operation.

Florida is not the only state to provide for an all-lines JUA. Minnesota, for example, has such a JUA, along with a FAIR plan and other residual market facilities for autc insurance, workers' compensation, medical malpractice and liquor law liability. Massachusetts also has a JUA for liquor law liability. Perhaps Hawaii has stretched JUA coverage further than any other state, providing some protection against poverty. The auto JUA in Hawaii is required tc provide auto insurance to many welfare recipients without charge.

Thus, when examined against the entire panoply of residual market devices in the United States, the Task Force finds that the allegation that the FPCJUA is unusually broad is not supported.

Fourth, the insurance industry alleges that the entire multi-line FPCJUA would have been activated if just one person or firm was unable to find coverage for only one kind of insurance. The industry allegation may be exaggerated. If the FPCJUA had ever been activated for any line of insurance because only one person has shown a need, it would have been because individual actions by members of the industry had

decided not to insure that single risk. A person or firm would have become eligible for coverage under the FPCJUA only after being turned down by the admitted market, the surplus lines market and the Market Assistance Program (MAP). There seems little doubt that the industry, operating through the MAP, could find coverage for a single insurable risk if the industry considered placing it through the MAP to be more advantageous than placing it in the FPCJUA. A somewhat analogous situation arose in the 1970s when the Government Employees Insurance Company (GEICO) became insolvent. The industry determined that it would be less costly to save GEICO than to pay its claims through the insolvency fund. Several major insurers bought GEICO stock to restore its solvency. Such cooperation within the MAP could easily avoid activating the FPCJUA for one or a small number of risks if it is advantageous to the industry to do so. Clearly, without the FPCJUA to offer an incentive, it would not be advantageous to the industry to undertake such cooperative action.

D. Countersignature Requirement

The 1986 legislation establishing the Task Force specifically directed it to consider Florida's countersignature requirement. Florida Statute 624.425 requires that all policies for property, casualty or surety insurance must be countersigned by local agents who are state residents.

The Task Force recommends against repeal of the countersignature requirement.

Proponents of the countersignature requirement assert that this provision assures that Florida policyholders will have a local agent who can provide advice on the nature, scope and limits of coverage that are most desirable and appropriate for the policyholder needs. The local agent, familiar with Florida laws and regulations, reviews policies from out-of-state insurers to assure they comply with Florida law. Further, the local agents assist in the claims process. Florida residents are protected from unqualified out-of-state or transient insurance agents. Finally, the requirement of a local contact point facilitates state corroboration of coverage and provides a means of accurately determining premium amounts for tax purposes.

The Task Force concludes that the repeal of the countersignature requirement would significantly harm Florida insurance agents without necessarily benefiting Florida insurance consumers. Based upon the responses of insurance companies to a questionnaire circulated by the Research Staff and testimony presented at public hearings, the Task Force finds that repeal would not necessarily improve liability insurance affordability

or availability. Under present law, the agent's commission on Florida policy which is produced out-of-state is shared by Florida agent as well as the out-of-state agent. If t countersignature law were repealed, the Florida agent would n be eligible to share the commission on a policy produced out-o state.

Virtually all other states currently have countersignatu requirements. Accordingly, if Florida unilaterally repealed i countersignature requirements, Florida agents would l disadvantaged when compared with agents in other jurisdiction: Florida agents would continue to be required to submit a portic of fees from policies sold in other states to foreign agents, bu would not receive a corresponding fee from the sales of policie to Florida consumers by out-of-state agents.

In theory, prices should fall for Florida insuranc consumers if a portion of the commission cost can be avoided. N empirical support for this possibility could be provided to the Task Force. First, it was noted that if the Florida agent is precluded from receiving a commission, the foreign agent may simply retain the Florida agent's share rather than give it to the customer in the form of lower prices. Second, most insurer responses to the staff questionnaires indicated that prices would not fall if the countersignature requirement were repealed.

No increased availability could logically be seen as emanating from repeal of the countersignature requirement. Because the Florida agent would not be assisting the insured in obtaining coverages if the countersignature requirement were

repealed, it seems clear that availability would not be increased.

This analysis suggest that repeal of the countersignature requirement has the potential to inflict significant economic harm upon Florida insurance agents. Florida insurance consumers would lose the services provided by a local agent without necessarily benefiting from price reductions. Accordingly, the Task Force recommends against repeal of the countersignature requirement.

E. Prohibition of Rebates and Fee Sharings

In Department of Insurance v. Dade County Consumer Advocate's Office,[1] the Florida Supreme Court held that the anti-rebate provision of Florida's Unfair Insurance Trade Practices Act[2] (FUITPA) was unconstitutional. The Task Force believes that this decision achieves sound public policy, because the provision prohibiting insurance rebates does not promote price competition and may have the potential for maintaining higher liability insurance rates.[3]

Attempts may be made to have the Legislature re-enact an anti-rebate statute in some form calculated to overcome the due process objections that were the basis for the Dade County decision. Even if the due process objections could be overcome, such anti-rebate legislation would be unwise, because of its anti-competitive effect. Therefore, the the Task Force recommends repeal of the invalid anti-rebate provision currently on the books, and further recommends rejection of any attempt to re-enact an anti-rebate statute.

FOOTNOTES
(Section II.E.)

[1]492 So. 2d 1032 (Fla. 1986).

[2]Fla. Stat. 626.951-.989 (1987).

[3]For a more extended examination, see Final Fact-Finding Report, 197-200.

F. Regulation of Reinsurance

As indicated in the Final Fact Finding Report[1], reinsurance is beneficial with regard to both insurance availability and affordability, but the extent of the benefit varies over the insurance underwriting cycle. When reinsurance is profitable, it is readily available and promotes both the availability and affordability of insurance. When reinsurance is unprofitable, it is not readily available and may restrict the availability and affordability of insurance to the public. During the tight portions of the most recent cycle, the impact of high reinsurance prices (and, in some cases, lack of supply) was felt most keenly in directors and officers liability insurance, umbrella liability insurance, and, to a lesser extent, medical malpractice insurance.

The international scope of reinsurance makes it very difficult to regulate. Tillinghast, Nelson & Warren, in a study conducted for the Task Force, considered several possible regulatory approaches. Their alternatives are discussed at pages 496-515 of the Final Fact-Finding Report.

The Task Force recommends against any major substantive reforms of regulatory provisions affecting the reinsurance marketplace at this time. The Final Fact-Finding Report concluded that reinsurance was not a significant factor in most liability insurance affordability and availability problems in Florida. Further, the substantial international component of the reinsurance market makes regulation by a state government, and, to a lesser extent, the Federal government, very difficult.

The Task Force does believe that state regulators from a states should cooperate to improve the reporting of data reinsurers. More information from reinsurers would produce t positive results:

(1) reinsurance marketplace stability would be facilitate by allowing regulatory officials, and primary insurers to identify financially troubled reinsurers at a earlier point in time; and

(2) reinsurance companies would be assisted in pricin those classes of business in which the individua reinsurer's amount of experience data is not lar enough as to be reliable and meaningful.

In the view of the Task Force, increased information is probably best provided under a uniform statistical plan implemented by a newly established central data gathering organization. An alternative approach would be extensive revision of the existing reinsurer's Annual Statements required to be filed each year. The Task Force recommends that the Commissioner of Insurance begin negotiations with regulatory authorities in other states in order to establish improved reporting requirements for reinsurers. The Task Force recognizes that the National Association of Insurance Commissioners recently (December, 1987) imposed additional reporting requirements on reinsurance transactions, but the Task Force believes that even further reporting obligations should be encouraged.

FOOTNOTE
(Section II.F.)

[1]FINAL FACT-FINDING REPORT ON INSURANCE AND TORT SYSTEMS, 162-168.

G. Information-Reporting Requirements

When the Florida Legislature faced the liability insurance and tort "crisis" in 1986, it did so against a background of conflicting factual claims and conclusions by insurance companies, trial lawyers, consumers, physicians and other insureds. Reliable data about the profitability of insurance carriers, frequency of insurance claims and size of claims payments was not readily accessible to those responsible for establishing public policy. As a result, the Legislature deemed it necessary to establish this Task Force. Perhaps no portion of the Task Force's contributions have been more important than its efforts to collect reliable data, and from it, to reach meaningful conclusions about the causes of Florida's perceived problems with the availability and affordability of liability insurance.

Ultimately the Task Force and its research staff received excellent cooperation---and voluminous quantities of data--- from the insurance carriers and the Insurance Services Offices, Inc., as well as from other sources. This success, however, should not obscure the extensive efforts required of the Research Staff to collect these data nor the obstacles it had to overcome.

The Task Force recommends that unless a federal agency for the collection of data from the insurance industry is established, the state of Florida should establish ongoing information-reporting requirements for insurance carriers. The odds are against the ability of ad hoc study commissions such as the Task Force to collect and analyze the needed information

within a reasonable period of time. Scholars with expertise the insurance industry still need a substantial period of time become familiar with potential sources of data. Even stu commissions with subpoena power could be tied up in courts for period longer than the period given the study commission report. Even when a study commission and its research staff progressing expeditiously, public officials, interest groups a the news media may assert that they are taking too long, give the seriousness of the state's liability insurance problems.

The Task Force strongly endorses the ongoing collection c data from carriers doing business in the state of Florida, s that when there is political pressure for changes in the tort o insurance systems in the future, the Legislature and othe policymakers will have the data needed readily available to mak policy decisions.

The precise data to be collected should be determined after appropriate consultations between representatives of the Department of Insurance, the insurance carriers, the Insurance Services Offices and the appropriate legislative committees. Members of the Task Force Research Staff are willing to provide input. The information should be collected for lines, sublines and selected risk classes. The selected risk classes should include both typical or representative risk classes as well as risk classes which are under stress in the market. The data to be collected for lines, sublines and risk classes probably should include;

1. The number and dollar amount of claims closed both by year incurred and by year paid (Florida and countrywide);

2. Aggregate loss reserves (Florida and countrywide);

3. Premiums written (Florida and countrywide);

4. Premiums earned (Florida and countrywide);

5. Incurred claims (Florida and countrywide);

6. Incurred expenses (Florida and countrywide);

7. Allocated loss adjustment expenses (Florida and countrywide);

8. Net underwriting gain or loss (Florida and countrywide);

9. Policy inventories (Florida and countrywide);

10. Cancellations and non-renewals (Florida and countrywide);

11. Market prices/exposure unit (Florida and countrywide);

12. Number and size of deductibles and self-insured retentions; and

13. An analysis of policy size limits.

Also, company wide investment income derived from unearned premium and loss reserves for Florida and countrywide should be reported as well as company wide statutory and GAAP percentage return on equity figures.

In most cases, insurers were able to provide these data to the Task Force, once executive decisions were reached to cooperate with the Task Force. The information described here is necessary to address the issues of trends in loss payments, legal expenses, profitability, affordability and availability with which the Florida Legislature regularly is confronted, often at the urging of the insurance carriers. The Legislature and Department of Insurance require greater information from the insurance industry than from other industries, both because of

the public nature of the insurance industry and because t legislative and judicial branches heavily influence the cost the product through the primary role played by the amount total losses in determining insurance prices.

The Task Force recommends that small insurance carrie doing less than a specified amount of premium volume in the sta of Florida be exempt from these requirements if such an exemptic is constitutionally permissible.

If the information identified above were collected frc insurers in the state as part of an ongoing, routine reportin requirement, a consistent body of data eventually extending ove an entire underwriting cycle would result. A systematic analysi of this information would provide an objective assessment o trends in a number of measures of industry performance. Fo: example, widespread measures of trends in the cost of insuranc would provide information on the affordability of liability insurance without relying upon sporadic survey results or other sources of data which may be subject to bias. Availability problems can be measured through the use of policy inventory, cancellation, non-renewal, deductible and policy limit data instead of being restricted to simpler, but less accurate, measures such as premiums written.

The information required to be reported under this proposal would be similar to that requested under the draft legislation prepared by the National Conference of State Legislators.[1] It would also be similar to, but varies in some particulars from, the information that would be reported to the federal government

under House Bill 3643, introduced by Representative Al Swift (D-Washington).[2]

FOOTNOTES
(Section II.G.)

[1]A copy of the draft legislation prepared by the National Conference of State Legislators is attached as Appendix A to this report.

[2]Under Congressman Swift's Bill, the Department of Commerce would collect data on troubled insurance lines such as products liability and lines offering directors and officers coverage, day care coverage, liquor liability coverage, recreational liability coverage, government subdivisions liability coverages, manufacturers and contractors liability coverage and others. Information also would be required on specific risk classes such as those covering sporting goods or athletic equipment, aircraft or aircraft parts manufacturing, pharmaceutical manufacturing, toys and games manufacturing, and several others. The data to be collected under Representative Swift's Bill would include:

(1) Premiums written;
(2) Premiums earned;
(3) Investment income derived from unearned premiums and loss reserves;
(4) Incurred claims;
(5) Incurred expenses;
(6) Net underwriting gain or loss;
(7) Net operating gain or loss; including net investment income; and
(8) The number and dollar amounts of claims closed with payment, by year incurred and by the amount initially reserved for each claim.

Under Representative Swift's Bill, after collecting the data, the Secretary of Commerce would be required to report to state Insurance Commissioners on the adequacy or excessiveness of premiums, reserves and investment income and on other aspects of the industry's financial condition.

III. CONCLUSIONS: STABILIZING THE LEGAL AND LIABILITY INSURANCE ENVIRONMENTS IN FLORIDA

In 1986 the Legislature responded to serious problems in Florida's tort and insurance systems, some approaching crisis proportions, by enacting the Tort Reform and Insurance Act of 1986, probably the most comprehensive piece of reform legislation enacted in any American jurisdiction. At the same time, the Legislature created this Task Force to undertake a searching examination of the state's tort and insurance problems. These recent developments follow a pattern of unusual legislative activity in dealing with tort and liability insurance problems during the past ten or fifteen years.

The scope of legislative activity regarding the tort and insurance system attests to the seriousness of the perceived problems in Florida, as well as to the responsiveness of the Legislature. There is a downside to this flurry of activity, however, particularly when it is combined with an often active state judiciary and increased vigor in insurance regulation. Ironically, both the practice of law and the offering of liability insurance depend heavily upon stability, certainty and predictability if they are to meet the public's needs effectively.

Lawyers respond to changes in tort law in various ways that are intended to protect the interests of their clients but which impose increased burdens on the legal system. They may accelerate the filing of claims to avoid the effective date of newly enacted changes, or they may delay the filing of claims

until the new legislation has been tested or interpreted i court. New claims and alternative legal theories are develope to get around unwanted legal changes. The most substantia legislative changes are constitutionally challenged. There ar increased appeals until problems of interpretation have bee resolved. Settlement negotiations may be disrupted or beset wit added complexity as both sides try to asses the significance o legislative changes.

The disruption to the liability insurance market caused b instability is perhaps even more severe. The Task Force hear testimony from national insurance company executives regardin their perception that Florida's legal and regulatory environment are unstable ones, and these same concerns repeatedly were hear in response to the survey of liability carriers doing business ir Florida conducted by the Task Force Research Staff. Predictability of loss results for a large group of insureds is the essence of insurance. An unpredictable legal and regulatory environment contributes to insurance availability problems in Florida as insurers prefer to expand their markets in more stable jurisdictions. These same concerns increase affordability problems as Florida insurers price their coverages with justifiably cautious large loss reserves, because the losses of their insureds may be increased by the unpredictable actions of state lawmakers and regulatory authorities. Potentially constructive, but untested, reform proposals which "sunset" three or four years after enactment provide little encouragement to actuaries predicting long-term loss experience.

The point is not to suggest that legislative reform is counterproductive or that its unsettling effects upon the legal and insurance systems are inevitably bad. The point is rather to emphasize that the state of Florida has experienced an unusually turbulent time for the tort and liability insurance systems and to suggest that what may be needed now, as much as anything, is a sustained period of relative stability in the legal environment, so that necessary adjustments can settle into place.

Liability insurance, as a market system, has the capacity to adapt to different sets of legal conditions, if the conditions are stable enough to permit evaluation, prediction and long range planning. One need not suppose that current reform legislation in Florida has achieved ideal legal conditions, in order to suggest that everyone might benefit from a short moratorium on further major legislation affecting the tort and insurance systems.

A recent California agreement recognized the need for a respite from continuing efforts to revise tort and liability insurance laws. On September 11, 1987, a document was signed by the Association of California Insurance Companies, the California Trial Lawyers Association, the Association for California Tort Reform, the California Medical Association, and the California Chamber of Commerce, agreeing to refrain from initiating or supporting further tort or liability insurance reform legislation for a period of five years. While the Task Force is not the appropriate vehicle for developing a similar agreement among contending interest groups in Florida, it does recognize the

potential value that could result from stabilizing the leg environment.

The Task Force realizes that the current Florida legislatu cannot bind its successors to a self-imposed moratorium, but resolution recognizing the desirability of such a policy coul have salutary effects. Therefore, the Task Force recommends tha the legislature adopt a resolution recognizing that the extensiv reforms adopted by the 1986 Act and further revisions adopted i response to Task Force recommendations are viewed as a comprehensive reform effort, which should be left intact for the next five years, in order to provide a stable legal environment within which the tort and liability insurance systems can make optimal adjustments. Such a resolution might influence contending special interest groups to channel their energies into making the best of current law instead of continuing to agitate for reform legislation at every point of passing discontent.

APPENDIX A

National Conference of State Legislatures

Model Commercial Liability Data Reporting Act

Section I.

Purpose - It is the purpose of this Act to: (A) provide state policymakers and the public with relevant information on commercial liability insurance; (B) promote uniformity among the states; and (C) provide detailed information on sensitive or troubled liability lines of insurance.

Section II.

Definitions

(A) "Company" means an individual company, not part of a company group, licensed to write property or casualty insurance in the state of _____. It does not include surplus lines companies;

(B) "Company group" means a group of commonly owned companies, or companies under common management and control, that are licensed to write property or casualty insurance in the state of _____. It does not include surplus lines companies; and

(C) "Risk retention group" is defined pursuant to 15 U.S.C. 3901(a)(4).

Section III.

Insurer Reporting Requirements

(A) Each Company, Company group or (as allowed by federal law) Risk retention group (hereinafter collectively referred to as "insurer") shall submit an annual (or quarterly, as appropriate) report to the (appropriate regulator of insurance in the state hereinafter referred to as "Commissioner") in a form prescribed by the Commissioner showing its liability insurance writings and experience in this State and countrywide for the prior year for purposes of preparing the summary required by Section VII.

Drafting Note: Subsection (B) below calls for financial data relating to lines of insurance while Subsection (C) below calls for analytical data relating to classifications of insurance (narrowly defined subsets). For the combined use of these Reports, see the Drafting Note under Subsection (C) (2).

(B) Financial Report. Each insurer is required to submit an annual financial report as herein provided.

Drafting Note: Financial reports are designed to meet the informational needs of the legislature and Commissioner as to the statutory profitability in this state from a given line or subline of liability insurance. These reports will provide information in a format similar to the information provided in the Annual Statement and the Insurance Expense Exhibit thereby giving rise to the term "financial."

(1) The financial report required by this Subsection shall include, but not be limited to, the following lines of insurance:

a. Commercial automobile insurance no-fault (personal injury protection);

b. Other commercial automobile insurance liability;

c. Products liability insurance;

d. Medical malpractice insurance;

e. Other general liability insurance;

f. Any other Annual Statement liability line designated by the Commissioner.

(2) The financial report filed pursuant to this Subsection shall include the following data, both specific to this State and countrywide, for the prior calendar year:

a. Direct premiums written;

b. Direct premiums earned;

c. Incurred loss and loss expense developed as the sum of the following: (A) dollar amount of losses paid, plus (B) reserves for reported claims at the end of the current year, minus (C) reserves for reported claims at the end of the previous year, plus (D) reserves for incurred but not reported claims at the end of the current year, minus (E) reserves for incurred but not reported claims at the end of the previous year, plus (F) loss adjustment expenses paid, plus (G) reserves for loss adjustment expenses at the end of the previous year, minus (H) reserves for loss adjustment expenses at the end of the previous year.

Drafting Note: Submission of the sum total should be deemed sufficient for Subparagraph c.

d. Incurred expenses allocated separately to commissions, other acquisition costs, general expenses, taxes, licenses and fees, using appropriate estimates when necessary;

e. Policyholder dividends;

f. Underwriting gain or loss;

g. Net investment income, including net realized capital gains and losses, using appropriate estimates where necessary;

h. Federal income taxes;

i. Net income.

(C) Analytical Report. Each insurer is required to submit an annual (or quarterly, as appropriate) analytical report as herein provided.

Drafting Note: Analytical reports are designed to meet the informational needs of the legislature and the Commissioner as to the premiums and losses in this state for specific classifications of insurance. (Classifications by definition are rather narrowly defined subsets of insurance, such as day care or liquor liability insurance). Many companies will have only a small volume of premiums and losses in these classifications of insurance; therefore, the calculations required to analyze the overall experience in these classifications are best performed after individual company data are transmitted to and compiled by the Commissioner.

(1) The analytical report required by this Subsection shall include, but not be limited to, the following classes or class groups as rated and coded in accordance with an approved statistical plan:

a. Municipal liability;

b. Recreational liability;

c. Day Care liability;

d. Liquor liability;

e. Any other class or class group designated by the Commissioner, upon due notice and after a hearing.

Drafting Note: The Commissioner should specify statistical classes to be included for each category requested under Subsection (C) to assure response consistency. It may be appropriate to provide the data under Subsection (C) on an optional basis ("at the request of the Commissioner") because only certain classes may be a problem in a particular state.

(2) The analytical report filed pursuant to this Subsection shall include the following data, both specific to this state and countrywide, for the prior calendar year:

a. Calendar year direct premiums earned;

b. Calendar year direct losses incurred and reported, including allocated loss adjustment expenses, separately by the year in which the policy was written.

Drafting Note: An example of the format of the ongoing analytical report (subparagraphs a and b of Subsection (C) (2)) is enclosed; this particular compilation (which in this case has been prepared by a statistical agent) relates to Recreational Classes). For analytical report purposes the data required in paragraph (2) of this Subsection are similar to the financial report data requirements of Subparagraph (c) of Subsection (B) (2). The remainder of the financial data requirements of Subsection (B) (2) are not needed for the analytical report;

however the expense and investment income data compiled for the financial report can nonetheless be utilized to estimate profitability under Subsection (C) (by using a percentage of premiums or losses).

It may be appropriate (optional) to provide data by which the Commissioner (or designee) can calculate industrywide total losses. The language to accomplish this could be added as subparagraph c:

"c The initial (1988) analytical report shall include the cumulative direct losses incurred and reported, including allocated loss adjustment expenses, as of the beginning of calendar year 1988 for each of the policy years included in subparagraphs a and b above."

This one-time only report would provide the Commissioner (or designee) with the base from which to calculate industrywide total losses and allocated loss adjustment expenses (including incurred but not reported losses) for purposes of preparing the required summary pursuant to Section VII. The enclosed analytical report to the Model Act already includes a calculation of ultimate incurred losses (including allocated loss adjustment expenses); therefore, use of the enclosure to the Act obviates the need for the optional language.

(D) Each insurer may designate a statistical agent for purposes of satisfying all or any portion of the requirements of this Section on an individual or aggregate basis.

Section IV.

Price Monitoring Requirements

(A) Each insurer writing commercial multiple-peril, general liability or commercial auto insurance in this state shall, upon the request of the Commissioner, submit data to the Commissioner establishing the relationship in this state of the aggregate premiums actually charged policyholders by such insurer for each such line of insurance to the premiums produced by the insurer's filed unmodified rates for each such line of insurance. Any insurer whose data indicate that the aggregate premiums actually charged policyholders for each such line of insurance exceed the premiums produced by its filed unmodified rates by more than a percentage established and published by the commissioner or fall below the premiums produced by its filed unmodified rates by more than a percentage established and published by the Commissioner shall be examined by the Commissioner to determine whether its rating plan or filed unmodified rates comply with _____ (cite appropriate rating law section). The time period such data are to cover and the form in which they are to be submitted shall be prescribed by the Commissioner.

(B) Each insurer may designate a statistical agent for purposes of satisfying all or any portion of the requirements of this Section on an individual or aggregate basis.

Drafting Note: Residual market business and risks which are loss rated, "a" rated or composite rated are to be excluded. This provision will have to be adjusted in a state where rates are not filed. Furthermore, this Section may be particularly appropriate in those states with rating laws explicitly authorizing the Department of Insurance to establish systems to monitor competition.

Section V.

Penalty for Failure to Comply With Reporting Requirements

The Commissioner may levy an administrative fine of not more than $_____ against any insurer failing to comply with the reporting requirements contained in this Act.

Section VI.

Submission Date

(A) The annual report required by Section III of this Act shall be due by the first of July of the next year. The first report due pursuant to this Act shall be filed on or before July 1, 1988 for the year 1987. Subsequent reports shall be filed on or before July 1 through July 1, 1992 for each prior year.

Drafting Note: Reporting of data under Subsection (B) of Section III should be submitted for a calendar year as indicated in the text under Subsection (B). When analytical data are reported under Subsection (C) of Section III such data should be reported either for a completed calendar year or calendar quarter as indicated in the text under Subsection (C). This alternative is provided in part because analytical data may be viewed as more meaningful on a quarterly basis. If quarterly reporting for Subsection (C) is preferred, an appropriate adjustment to the text of Section VI is needed.

(B) The report(s) required by Section IV of this Act shall be submitted on a (quarterly) basis as prescribed by the Commissioner.

Drafting Note: Quarterly reporting for Section IV seems more appropriate. See Drafting Note under Section IX.

Section VII

Publication of Data Summary

(A) It shall be the duty of the Commissioner of prepare a report, not later than November 1, which summarizes the data submitted pursuant to this Act. Such summary shall be prepared on an aggregate basis and individual Company, Company group or Risk retention group data shall be maintained on a confidential basis.

(B) A copy of the Commissioner's summary shall be sent to:

1) The President of the Senate
2) The Speaker of the House

3) The Governor, and
4) The National Conference of State Legislatures for further analysis and distribution to state legislatures.

(C) Copies of the Commissioner's data summary shall be available upon request to any resident of this state at the cost of printing.

Section VIII.

Exemption from Reporting

(A) The Commissioner may exempt an insurer from the requirements of this Act or waive, modify or defer the requirements of this Act with respect to an insurer upon a determination that reporting by such insurer:

1) would be unnecessary to the purposes of this Act; or
2) would impose an unreasonable burden on such insurer; or
3) would be statistically insignificant.

Section IX.

Future Regulations

(A) The Commissioner shall adopt regulations (or issue a Bulletin) to implement the provisions of Section III of this Act. As an alternative, the Commissioner may adopt a model commercial liability data reporting regulation. Compliance with the requirements of such a model regulation shall be deemed to satisfy the data disclosure requirements of Section III of this Act if the Commissioner, after notice and hearing, determines that such data disclosure regulation requirements are, in total, at least as effective as the data disclosure requirements of Section III of this Act.

Drafting Note: The alternative compliance technique is provided to facilitate the adoption of a model data disclosure regulation that may be developed (e.g., by NCSL, NAIC, etc.) and found suitable for local use.

(B) The Commissioner shall adopt regulations (or issue a Bulletin) to implement the provisions of Section IV of this Act.

Drafting Note: The Regulations needed to implement Section IV must be drawn in a manner that provides the Commissioner with timely information without imposing an unnecessary burden on an insurer because of timing or because a particular insurer's data base is too small to be credible. For example, if an insurer's market share is below a threshold figure the data may not be credible. The initial report under Section IV should be submitted on or before 150 days after the close of a predetermined period (quarterly reporting seems appropriate). Thereafter, the reports will be furnished every 90 days. This extra time for the first report only is needed to allow for systems changes.

Section X.

Statutory Conflict

This act shall be interpreted to supersede any law or any portion thereof in this state establishing data disclosure requirements for an insurer to the extent such law or portion thereof is in conflict with or represents a duplication of this Act.

CERTIFICATE OF AUTHENTICITY

I HEREBY CERTIFY that the foregoing report entitled "Final Recommendations" is a true and correct copy from the files of the Senate Commerce Committee; this _____ day of May, 1993.

Senate Commerce Committee

By:_____